No. 70-30

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

GEORGE J. RUTLEDGE, Plaintiff-Appellant, -vs- BERNARD E. NIEWOEHNER, III, Defendant-Appellee.	Appeal from the Circuit Court of Fayette County. Honorable F. R. Dove, Judge Presiding.

Per Curiam:

The plaintiff appeals from an order of the Circuit Court of Fayette County, Illinois, granting defendant's motion to dismiss his "verified second amended complaint."

On this appeal he now seeks to make contentions that should properly have been made in the trial court. We do not reach the question of whether appellant is precluded from so doing, because we find that there has been no final judgment disposing of the entire proceedings in this case as required by Illinois Supreme Court Rule 304.

We therefore must dismiss this appeal because we have no jurisdiction to consider it.

Appeal dismissed.

PUBLISH ABSTRACT ONLY.

1 IA 3 107

(24540—4M—9-70) 160-o

STATE OF ILLINOIS

ABST.

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the State of Illinois, sitting at Springfield:

PRESENT

HONORABLE SAMUEL O. SMITH, Presiding Judge

HONORABLE HAROLD F. TRAPP, Judge

HONORABLE JAMES C. CRAVEN, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 27th day of August A. D. 19 71, there was filed in the office of the Clerk of the Court an opinion of said Court, in words and figures following:

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

General No. 11407 Agenda No. 70-82

Donald H. Galloway, Petitioner-Appellee vs. Ray Page, Individually and as Superintendent of Public Instruction, and Robert L. Brissenden, Secretary of the Illinois State Teachers Certification Board, Defendants-Appellants	)	Appeal from Circuit Court Sangamon County

Trapp, J.

The trial court ordered that a writ of mandamus issue directing the defendants, Ray Page, individually and as Superintendent of Public Instruction, and Robert L. Brissenden, Secretary of the Illinois State Teachers Certification Board, to forthwith issue a correct all-grade supervisory certificate, No. 780862, dated October 2, 1967, to petitioner, and further commanded such Secretary to issue and deliver a letter to the Superintendent stating that petitioner was qualified to be a candidate for the office of superintendent of an educational service area. The latter was further commanded to issue a certificate of qualification of petitioner as a candidate for such office. The defendants

appeal. Argument in this court was expedited and the order was affirmed with an opinion to follow.

Upon this record, there is no contention that petitioner is not qualified for either the certificate or the office. The issue is whether a certificate issued through ministerial error may now be corrected. The defendants contend here that there is no authority to issue a corrected certificate citing the provisions of Ill. Rev. Stat. 1963, ch. 122, § 21-7: "Until June 30, 1968, an all-grade supervisory certificate may be issued * * *", and the provision of § 21-7.1 which provides that after June 30, 1968, a statutory "superintendent endorsement" shall be required as a qualification for the office of county superintendent of schools. By statute effective in 1969, the latter office was designated "superintendent of an educational service region". Ill. Rev. Stat. 1969, ch. 122, § 3-.01.

Petitioner had had some fifteen years of teaching experience. In June, 1967, he completed the academic requirements for a master's degree in education at Western Illinois University. The sum of the several factors qualified him for the certificate at issue. Ill. Rev. Stat. 1963, ch. 122, § 21-7, concerns the all-grade supervisory certificate and provides that it shall be issued to persons with the requisite degrees and qualifications.

The record indicates that pursuant to petitioner's request, the University presented petitioner's qualifications upon a form of the Illinois State Teachers Certification Board designated "CAE-1" with a caption "Application for Certificate of Entitlement". The evidence suggests that there was error in the form

used by the University. The form did not provide a blank for the "all-grade supervisory certificate", but the words "all-grade" were written beside a blank designated "general supervisory". Upon the form in evidence, the words "all-grade" had been marked over.

Petitioner also filed a form of the Board designated: "Application for Certificate All-Grade Supervisory (K-14)" under date, October 2, 1967.

On October 2, 1967, the Board issued to petitioner a certificate designated "general supervisory". It also bore the classification "K-14" as in the application last described. Such certificate was registered by one Witty on October 4, 1967, as the county superintendent of schools in the county where petitioner was employed. There is no contradiction of the testimony of petitioner that the certificate was discussed as an "all-grade" certificate, and that it was placed in petitioner's file in the office of Witty. The record includes the latter's receipt for the registration of the certificate wherein such is designated as "all-grade".

The sufficiency of the certificate was raised when the petitioner sought to become a candidate for the office of superintendent of the educational service area. Witty was also a candidate.

Petitioner obtained a hearing before the Illinois State Teachers Certification Board on January 30, 1970. The defendants,

Page and Brissenden, were present and participated. A transcript of the proceedings is in the record. The Board considered the several documents and the statements made. Legal counsel for the Superintendent was present and advised that the Board issued the certificate, that it could not issue such certificate under the current law, but that if the Board determined that there had been an error, it could order that the error be corrected. The transcript of this meeting and the minutes of the Board show that after discussion and upon motion, the Board adopted a resolution that a corrected certificate issue bearing the same date and number as on the certificate theretofore executed.

The exhibits show that when the corrected certificate was transmitted to Witty for his endorsement he objected to the document. Thereafter on July 17, 1970, legal counsel for the Superintendent advised defendants of his view that petitioner's request should be denied.

We note that such counsel's opinion is in terms of the power to "issue" the certificate under the statute rather than in terms of correcting an error as determined in the resolution adopted by the Board. Nothing in the record suggests that the Board was ever advised of such opinion, or that it ever reviewed or acted upon such legal recommendation.

In Van Dorn v. Anderson, 219 Ill. 32, 76 NE 53, it was held that mandamus would lie to compel a county superintendent of schools to date a certificate correctly. The writ serves to compel the performance of an official act in a proper manner

when such act is ministerial in nature. This record discloses that any discretion to be exercised was in the Illinois State Teachers Certification Board which by its resolution had determined that a corrected certificate should be issued to the petitioner.

Judgment affirmed.

SMITH, P.J. and CRAVEN, J., concur.

(24540—4M—9-70) 160-o

STATE OF ILLINOIS

ABST.

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the State of Illinois, sitting at Springfield:

PRESENT

HONORABLE SAMUEL O. SMITH, Presiding Judge

HONORABLE HAROLD F. TRAPP, Judge

HONORABLE JAMES C. CRAVEN, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 27th day of August A. D. 1971, there was filed in the office of the Clerk of the Court an opinion of said Court, in words and figures following:

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

General No. 11334 Agenda 71-52

City of Lincoln, Illinois, a Municipal Corporation,

Plaintiff-Appellant,

vs.

Victor E. Thudium,

Defendant-Appellee.

Appeal from Circuit Court Logan County

CRAVEN, J.

The zoning ordinance of the City of Lincoln provides that where an industrial or commercial use is to be established adjacent to "residential properties" there shall be provided along the property line an ornamental fence not less than 6 feet in height suitable to visibily screen the commercial use from the residential use. The City filed a Complaint in the circuit court charging the defendant with a violation of this ordinance provision and a failure to provide an ornamental fence as required by the ordinance. The trial court found the defendant not guilty and this appeal by the City is from the judgment entered.

For the most part the facts are stipulated by reference to briefs containing statements of fact filed in the trial court. The defendant owns a tract of land fronting on Woodlawn Road, an

east and west street in the City of Lincoln. A north and south street, College Street, is the west boundary of the defendant's property. The property is 635 feet from east to west and 633 feet from north to south. Woodlawn Addition zoned residential is east of the defendant's property but the two are separated by a strip of land some 19 feet wide that runs along the property from north to south. This 19 foot strip is described as a "no-man's land" and for more than 20 years apparently has been in the possession of property owners of the lots in Woodlawn Addition.

Under the original zoning ordinance of the City, the south 150 feet of the defendant's property was zoned C-2 Commercial. The remainder of the tract was R-2 Residential. In 1968 the north 200 feet of the south 350 feet was changed from the R-2 classification to a C-2 classification except for a 5 foot strip along the east side and west side of the 200 feet. These two strips, 5 feet wide and 200 feet long, remained in a residential classification; thereafter the south 350 feet of the defendant's property was leased to the Kroger Company and a Kroger grocery store is operated thereon.

Thus the south boundary line is adjacent to a street and the ordinance has no application. The south 150 feet of the west boundary is adjacent to College Street and the ordinance has no application. The north 200 feet on the west is adjacent to the 5 foot residential strip which is adjacent to College Street.

The north 200 feet of the east boundary is adjacent to a 5 foot residential strip which is itself adjacent to the 19 foot "no-man's land". The south 150 feet on the east is adjacent

to the "no-man's land" which is adjacent to a residential zone. However, an added item of complication is that the south 150 feet of the residential zone is, in fact, occupied by an auto repair shop which constitutes a non-conforming use. The ordinance can have no application to the area occupied by the non-conforming use since the ordinance is applicable only when the commercial use is adjacent to "residential property."

The north boundary area becomes even more involved. 18th Street, which apparently really hasn't been used as a street, but neither has the dedication for street purposes been vacated, terminates on the east boundary of the defendant's property. At some point in response to a request that 18th Street be repopened, the defendant agreed to dedicate a 50 foot strip to the City to be used for street purposes to permit an extension of 18th Street from the point of termination running through the defendant's property in an east and west direction. A deed to that effect was delivered by the defendant to his attorney. The attorney so advised the City by a letter in July 1969. The delivery of the deed to the City was to be conditioned upon the City making 18th Street extend through the property and available to the public for street purposes. The City accepted the dedication. The city attorney concedes that in considering the motion to accept the dedication there was considerable confusion at the council meeting as to whether they were accepting a dedication or reacting to a mere proposal of an option. Be that as it may, the minutes of the city council show that a motion was made, seconded and passed to accept the dedication. Thus upon the record as it now exists, the ordinance here involved has no application along the north boundary line.

There is left remaining the issue as to the necessity for erecting a fence that would visibly screen the commercial use along the north 200 feet on both the east and the west side, which north 200 feet is adjacent to a residential classification which is 5 feet wide and 200 feet long. Aside from the patent invalidity of such classification - it being obvious that there can be no residential use of such a strip - the ordinance has no application for the further reason that it is applicable only when a commercial use is to be established adjacent to "residential properties". "Residential properties", under the required strict construction of an ordinance penal in nature, cannot be equated with a residential zoning classification.

It is true as the defendant asserts that there is a presumption of the validity of the zoning ordinance and no cases need to be cited to that effect. It is too much of a burden to impose upon such presumption to establish the validity of this ordinance when the zoning classification is so patently invalid.

Having reached this conclusion, it is unnecessary to decide whether the fencing that the defendant did do in certain of the areas was or was not sufficient to visibily screen the commercial use. The judgment of the circuit court in finding the defendant not guilty was correct and is affirmed.

Affirmed.

SMITH, P.J. and TRAPP, J., concur.

1 IA 3 144

(24540—4M—9-70) 160-o

ABST.

STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the State of Illinois, sitting at Springfield:

PRESENT

HONORABLE SAMUEL O. SMITH, Presiding Judge

HONORABLE HAROLD F. TRAPP, Judge

HONORABLE JAMES C. CRAVEN, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 27th day of August A. D. 19 71, there was filed in the office of the Clerk of the Court an opinion of said Court, in words and figures following:

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

General No. 11349 Agenda 71-99

People of the State of Illinois,
Plaintiff-Appellee,
-vs-
Charles Davidson,
Defendant-Appellant.

Appeal from
Circuit Court
Macon County

MR. JUSTICE CRAVEN delivered the opinion of the court:

Upon his plea of guilty, defendant was convicted of armed robbery. He filed an application for probation which was denied after hearing. The defendant was thereupon sentenced to a term of not less than two, nor more than ten years in the Illinois State Penitentiary. He appeals. The Illinois Defender Project was appointed to represent the defendant on appeal. The Defender Project has filed a motion for leave to withdraw as counsel accompanied by a statement relating its judgment that there are no arguable points, that the appeal is wholly frivolous, and further proceedings by them as appellate counsel are said to be unwarranted. The motion to withdraw is in accordance with Anders v California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed 2d 493.

Counsel point out that prior to the defendant's plea of guilty he was fully admonished as to the consequences, including the minimum and maximum sentence. He was fully advised as to his right to a trial by jury and other constitutional and procedural rights and the court ascertained that there was a factual basis for the plea of guilty. The minimum sentence imposed is the statutory minimum.

The defendant was given an opportunity to file additional points and authorities. By letter he has requested the appointment of other counsel but he does not suggest any additional points relative to this appeal.

In accordance with the duty imposed upon this court to fully review the record to ascertain the existence of any meritorious grounds for appeal, we have reviewed the record; we agree with counsel that this appeal would be frivolous for the reasons stated. The motion of Illinois Defender Project for leave to withdraw as court-appointed counsel is allowed and the judgment of the Circuit Court of Macon County is affirmed.

Affirmed.

SMITH, PJ., TRAPP, J., concur.

71-22

1 I.A. 223

UNITED STATES OF AMERICA

ABST.

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 7th day of December, in the year of our Lord one thousand nine hundred and seventy, within and for the Second District of Illinois:

Present -- Honorable THOMAS J. MORAN, Presiding Justice
Honorable MEL ABRAHAMSON, Justice
Honorable GLENN K. SEIDENFELD, Justice
HOWARD K. KELLETT, Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On September 17, 1971 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

71-22

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

Abstract

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. EUGENE H. WESTPHAL, Defendant-Appellant.	Appeal from the Circuit Court of the 15th Judicial Circuit, Carroll County, Illinois.

MR. JUSTICE SEIDENFELD delivered the opinion of the court:

On May 1st, 1967 defendant was convicted upon his plea of guilty to an information charging him with Burglary. He was placed on four years probation, conditioned upon commitment for sixty days. In 1968 a petition to revoke probation was filed. Upon a hearing certain additional conditions were imposed but the probation term was reduced to one year. In 1969 a second petition to revoke probation was filed and after a hearing defendant was recommitted to probation for four years plus six months, the first six months to be served at the Illinois State Farm at Vandalia. On May 1st, 1970 a third petition to revoke probation was filed. Subsequently certain charges were withdrawn and the cause was heard on the amended petition on November 13th, 1970. Probation was revoked and defendant was sentenced to two to four years in the penitentiary on the original charge of Burglary. He has appealed, being represented by an appointed attorney from the Illinois Defender Project.

Appellate counsel has petitioned for leave to withdraw from the case. He states that he has studied the entire record and that he has made an examination to determine whether defendant's rights against multiple prosecution and former prosecution, as protected by Secs. 3-3 and 3-4 of Chapter 38, Ill.Rev.Stat. 1965, were violated; has also considered whether the defendant's right to a speedy hearing was violated; has further considered whether the State met its burden of proving the violation by a preponderance of the evidence as required; and, lastly, has considered whether or not the sentence imposed could be considered excessive. In accordance with the procedure set forth in Anders v. Calif., 386 U.S. 738 (1967), the defender has submitted the common law record and the transcript of proceedings to this court and has filed a brief in support of his petition, stating that the direct appeal is wholly frivolous and without merit. A copy of the petition and brief was mailed to the defendant and he was permitted ample time to file any additional matters on his behalf but has not done so.

It appears from the record that prior to the last amended petition to revoke probation, substantially, the stated basis for the revocation was a charge of Receiving Stolen Property. In our view these charges, which were later dismissed or withdrawn, were not related in any form to the charges of Burglary and Theft which were the bases set forth in the final amended petition upon which the probation was revoked. Defendant's privately retained counsel argued at the revocation hearing that a confession of defendant, which had been taken in connection with the charges which were thereafter dismissed, should not be available as proof in the hearing on the amended petition. However, the court considered that defendant had not made a timely motion to suppress the confession in the hearing on the amended petition for revocation or probation and, moreover, found sufficient cause for revocation without the necessity of considering the confession. A probationer

facing a hearing to revoke his probation is not in the same position as one initially charged with a crime because he is free by clemency of the court which has conditionally postponed his sentence provided he faithfully fulfills the requirements of probation which are imposed. See People v. Kostaken, 16 Ill.App.2d 395, 398, 399 (1958); People v. Morgan, 55 Ill.App.2d 157, 160, 161 (1965); People v. Simms, 108 IllApp.2d 281, 282 (1969). No right of defendant against multiple prosecution nor any other of the defendant's rights were therefore violated by the hearing on the amended petition for revocation.

Nor was defendant deprived of a speedy trial. The last day of delay attributed to the defendant took place on July 13th, 1970, and the hearing on November 13th, 1970, would be within the 120 day statutory period, in any event. Moreover, it would appear that Chapter 38, Sec. 103-5, Ill. Rev.Stat. 1967 is not applicable to a probationer during the term of probation, since the court maintains jurisdiction over him during the entire period of his probation.

A review of the testimony adduced at the hearing clearly shows that the State met its burden of proving the violation of the probation by a preponderance of the evidence as required. See People v. Morgan, 55 Ill.App.2d 157 at 160; People v. Madden, 56 Ill.App.2d 196, 198 (1965).

From our examination of the record of the probation hearings, and noting defendant's background and prior violations, we are satisfied that the sentence, which was within the statutory limits prescribed for burglary, is not excessive and should not be reduced.

We have made a full examination of all proceedings in accordance with Anders v. Calif., 386 U.S. 738, supra, and we sustain the position of the Defender. His motion for leave to withdraw is allowed and the judgment is affirmed.

JUDGMENT AFFIRMED.

MORAN, P.J. and ABRAHAMSON, J. concur.

70-64
UNITED STATES OF AMERICA

ABST.

1 I.A.3 297

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 7th day of December, in the year of our Lord one thousand nine hundred and seventy, within and for the Second District of Illinois:

Present -- Honorable THOMAS J. MORAN, Presiding Justice
Honorable MEL ABRAHAMSON, Justice
Honorable WILLIAM L. GUILD, Justice
HOWARD K. KELLETT, Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On September 9, 1971 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

PUBL. IN ABST.

70-64

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS Plaintiff Appellee -vs- FREDERICK FREERKING Defendant Appellant	)	Appeal from the Circuit Court of Lake County, 19th Judicial Circuit Hon. Lloyd A. Van Deusen Judge Presiding

MR. JUSTICE GUILD delivered the opinion of the Court.

The defendant was indicted for burglary. It appears that on the night of July 7th, 1969, the defendant was apprehended in a service station in Fox Lake, Illinois. He had gained access by breaking a window in the door and was found by the Fox Lake police hiding behind a door in the station. His accomplice was found lying on the front seat of a stolen car parked in back of the station. The car had been stolen in Rantoul, Illinois.

The defendant plead guilty, was found guilty and a hearing in aggravation and mitigation was had. His application for probation was denied and he was sentenced to four to eight years in the Illinois State penitentiary.

Upon appeal the defendant urges that the sentence is too severe and that the court in accepting his plea of guilty failed to advise him of the minimum sentence that might be imposed. The court's admonishment is as follows:

> "Court: You understand the sentence that can be imposed by the court, and in the question of burglary, I think is without limitation. You can be sent to the penitentiary for the rest of your life. You understand that.
>
> Defendant: Yes, Sir.
>
> Mr. Chervin (Public Defender): That's a possibility.

Court: That's the maximum penalty that could be imposed. It's a indeterminate term which has upward limitations. For all practical purposes the term could be imposed which would place you in the penitentiary as long as you live. You understand that's a possibility?

Defendant: Yes, Sir."

Defendant contends that the court's failure to admonish him of the minimum sentence that might be imposed (one year) causes the plea of guilty to be void. This court is of the opinion that the answer to this contention is found in People v. Kontapoulos 26 Ill.2d 388, 186 N.E.2d 312 (1962). In that case the defendant was charged with reckless homicide. The court in accepting his plea of guilty admonished the defendant that the court could sentence him to a "term in the penitentiary from 1 to 5 years." The defendant upon appeal urged that this admonishment was insufficient as the statute for reckless homicide also provided that punishment might be imposed by a fine, sentence in the county jail or a combination of both fine and imprisonment, and that the court failed to admonish him of the possible lesser penalty. The Supreme court in citing People vs. Marshall 23 Ill. 2d 216, 177 N.E.2d 835 (1961) stated:

> "The admonishment of the court must be read in a practical and realistic manner. (citation) The object of the admonishment is to inform the defendant of the consequences of his plea of guilty and to give him the right to withdraw his plea of guilty if, after hearing the consequences, he desires to be tried by a jury. (citation) In our opinion this object was fully accomplished when the court advised the defendant of the maximum penalty which could be imposed. Even in the absence of authority, reason compels the conclusion that a defendant who voluntarily enters a plea of guilty after being advised of the maximum punishment would have no reason to change his plea had he been advised that the punishment could be less severe."

The defendant's contention here is without merit.

Turning then to the contention that the penalty imposed is too severe, i.e., four to eight years; an examination of the attendant circumstances of defendant's arrest and his record is in order. As indicated above, the defendant was apprehended in the act of burglarizing the gas station; he admitted that on the same night he had burglarized two other gas stations nor could he explain why he was knowingly riding in a car that had been stolen earlier that month. Further, defendant is presently on probation from the State of Wisconsin for eleven counts of forgery and taking an automobile without the owner's consent in 1967; and has been charged with violation of his probation; he has three stolen car charges presently pending against him in Kenosha, Wisconsin; and charges pending against him for forgery in both Milwaukee and Racine, Wisconsin. He was AWOL from the U. S. army and received an undesirable discharge.

In addition to the above, the defendant was taken from the Lake county jail on August 19, 1969 to a dentist's office in Waukegan, where he escaped from custody but was apprehended about fifteen minutes later as he was trying to hitchhike a ride.

In view of the above it scarcely seems necessary to state that the sentence imposed of four to eight years is not excessive or arbitrary.

Judgment affirmed.

CONCUR, P.J. Moran and J. Abrahamson

70-271

1 Ill. App. 3d 375

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

ABST.

At a session of the Appellate Court, begun and held at Elgin, on the 7th day of December, in the year of our Lord one thousand nine hundred and seventy, within and for the Second District of Illinois:

Present -- Honorable THOMAS J. MORAN, Presiding Justice
Honorable GLENN K. SEIDENFELD, Justice
Honorable ROBERT J. SEARS, Justice
HOWARD K. KELLETT, Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On October 5, 1971 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

No. 70-271

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

Abstract

ED KEIM BUILDERS, INC., an Illinois Corporation, Plaintiff-Appellee, vs. BERNICE WEBB, Defendant-Appellant.	Appeal from the Circuit Court for the 18th Judicial Circuit, DuPage County, Illinois.

MR. JUSTICE SEIDENFELD delivered the opinion of the court:

Defendant, Bernice Webb, appeals from a judgment of $31,470.23 found due under a contract for the construction of a house. Defendant alleges that plaintiff failed to perform in a good and workmanlike manner, and did not provide several items called for in the contract, for which deductions from the contract price should be allowed. She also avers that the lower court, sitting without a jury, erred in awarding plaintiff damages for extras not provided for in the contract and specifications. Her final claim is that plaintiff failed to allege and prove its capacity to sue.

The building contract was entered into on November 25, 1968. The price was to be $37,123, and the contract provided that the house was to be constructed in a "good and workmanlike manner." In a rider to the contract, dated November 13, 1969, defendant agreed to pay extras of $1190. Other extras not in dispute total $899.37. Also not contested are credits granted to the defendant

totaling $7758.50.

In issue in this appeal are the following:

Claimed extras by plaintiff:		
(1)	Extra gravel	$284.33
(2)	Extra brick	171.03
(3)	Extra well wiring	60.00
		$515.36
Claimed allowances by defendant:		
(1)	Commission paid by defendant to Sal Lobianco	3,000.00
(2)	Repairs and corrections of house	2,105.00
(3)	Loss of market value to house due to undersize	1,500.00
(4)	Nondelivery of air conditioner	900.00
(5)	Nondelivery of humidifier	175.00
(6)	Noninstallation of a blacktop driveway	300.00
		$7,980.00

Of these disputed amounts, the lower court awarded all of the claimed extras to the plaintiff, and granted defendant a $500 allowance for repairs and corrections of the house. All other allowances were denied.

The findings of the trial court as to the claimed extras and allowances are binding upon us unless they are clearly and manifestly against the weight of the evidence. Rude v. Seibert, 22 Ill. App.2d 477, 483 (1959); Stoffel v. Kilian, 329 Ill.App. 498, 501 (1946).

Initially, defendant contends that the evidence was insufficient to support a judgment for plaintiff as to the three claimed extras. The November 13, 1969, rider to the contract contained a provision that no further extras would be performed without a work order in writing signed by Mrs. Webb. Defendant argues that she has signed no such order as to the gravel, brick, and well wiring, and therefore should not be required to pay for these extras. But notwithstanding that a building contract provides that all extras must be ordered in writing, the owner may waive such provision, and if he orders extras verbally, he is liable for them. Concord Apart. House Co. v. O'Brien, 228 Ill. 360, 369 (1907). See also C. & E.I.R.R. Co. v. Moran, 187 Ill. 316, 324 (1900). Mr. Keim

testified that all of these extras were ordered by Mrs. Webb, and that the extra gravel was ordered before the November 13th rider requiring a writing. He further stated that Mrs. Webb personally selected the brick to be used. As the trial court noted in its memorandum opinion, the defendant is not the ordinary house purchaser but is also engaged in one form or another in the building business, and previously had another building constructed by the plaintiff. She took possession of the premises and in fact prevented the plaintiff from completing or correcting some of the items involved in the dispute. Under the whole record, the court's award of the claimed extras to the plaintiff is not against the manifest weight of the evidence.

Defendant claims a $3000 allowance under the November 13th rider, which in part provides, "It is agreeable between Ed Keim and Sal Lobianco that if the completion of the Hunt house is not closed where Sal Lobianco has rec(ie)ved his commission for that sale that it would be perfectly all right for Mrs. Webb to use that $3000.00 as part payment for the money she owes Mr. Keim on the contract price." Keim owed Lobianco this money from a separate transaction involving the sale of a house to a Mr. Hunt, and defendant says that, pursuant to the rider, she paid $3000 to Lobianco. However, the only evidence that Mrs. Webb acually paid Lobianco was her own testimony that she did so, and other evidence cast doubt upon her financial ability to make such a payment. Lobianco did not acknowledge receiving it, and no cancelled check was presented. In addition, the authorization in the rider is conditional upon the Hunt closing, and defendant has not proven the occurrence of this condition. We agree with the trial court that there is not sufficient evidence upon which defendant can predicate this claim.

Defendant next contends that the trial court had no basis for limiting the deduction for repairs and corrections of the house to

$500. While a contractor may recover for the construction of a building where he has substantially performed the contract, the owner is entitled to a deduction from the contract price for the sum necessary to correct any defects. Mason v. Griffith, 281 Ill. 246, 255 (1917). Defendant cites the testimony of Charles Crawford, a contractor, that pursuant to defendant's request he inspected the house, and determined the price of repair for each defective item. He arrived at a total of $2105, and his estimates for repairing individual items cannot be added together to reach the court's sum of $500. However, Crawford also stated that the repairs would cost less if made by the original contractor, and Mrs. Webb prevented Keim's workers from making repairs. Furthermore, Crawford never stated that it would be feasible to make all of these repairs, but said only that he was given a list of things that needed fixing, and he put a price on each item. At no time did he divulge the standards he used in arriving at such amounts, and his testimony could lead one to conclude that, while many of these items failed to satisfy the witness's views of ideal construction policies, they were in fact constructed in a workmanlike manner. There was additional testimony that Mrs. Webb failed to object to the defects at the time, and that some of the alleged discrepancies from the plans may have been caused by a direction of Mrs. Webb that the house should correspond to the one Keim had previously constructed for her. On the basis of this evidence, we cannot say that the trial court erred in fixing the allowance for repairs at $500.

Defendant seeks a $1500 allowance for the alleged undersize of two bedrooms. Witnesses for defendant interpreted the building plans to require finished dimensions of 10 feet on one wall in each of the two bedrooms. Plaintiff's witnesses stated that anyone familiar with such plans would know that these were only rough

measurements, and that the finished size of the rooms was to be approximately 9 feet, 6 inches, which is what the rooms actually measure. The finding of the trial court against defendant is supported by sufficient evidence in the record to preclude us from holding it clearly and manifestly against the weight of the evidence.

There is conflicting evidence over whether plaintiff was required to furnish defendant with an air conditioner, humidifier, and blacktop driveway. The contract, brochure, and Keim's copy of the specifications all exclude the air conditioner. Keim's specifications exclude the humidifier, and the brochure excludes the blacktop driveway. Defendant's set of specifications does not exclude the air conditioner or humidifier. Defendant says that the contract price was increased $2000 to cover these items, but plaintiff counters that the increase was to recognize a change in the value of the lot. The rule of construction that ambiguities are to be resolved against the party creating them is inapplicable, because it cannot be said that plaintiff is solely responsible for the uncertainties present here. Nor did the lower court err in admitting oral evidence as to these transactions. A contract complete and unambiguous on its face cannot be modified by parol evidence, but an agreement which is ambiguous and subject to more than one interpretation may be explained by extrinsic evidence in order to arrive at the parties' intentions. Weiland Tool & Mfg. Co. v. Whitney, 44 Ill.2d 105, 114 (1969); Bell v. Pondell, 57 Ill.App.2d 404, 411 (1965). It was impossible here to arrive at the true contract merely by construction of its language. Rather, several conflicting documents, i.e. the contract, the brochure, Keim's specifications, and Webb's specifications, had to be considered. Oral evidence was properly admitted to explain the ambiguities created. Considering all of the evidence, the trial court's

denial of allowances for the air conditioner, humidifier, and blacktop driveway was not against the manifest weight thereof.

Finally, defendant's contention that plaintiff lacks capacity to sue because it failed to plead and prove its corporate existence is without merit. Defendant raised this question for the first time in her motion for a directed verdict at the close of plaintiff's proofs, which in our view was untimely. An appearance by plaintiff as a corporation is an assertion that it is a corporation only to be denied by a special plea of nul tiel corporation. Legnard v. Crane Co., 54 Ill.App. 149, 151 (1894). And a plea of general issue has the effect of admitting the capacity in which plaintiff sues, with the burden of proving corporate existence shifting to the plaintiff only upon a plea of nul tiel corporation. Henssler v. Wiese Drug Co., 133 Ill.App. 539, 540 (1907). Such a plea was filed in American Ins. Co. of Newark, N. J. v. McClelland, 184 Ill.App. 381 (1913), the only case cited by defendant in support of her position. Defendant has not fulfilled her affirmative duty of raising the issue in her pleadings, and therefore the defense has not been properly preserved for review.

Furthermore, defendant is estopped to deny the corporate existence of the plaintiff, after having treated and dealt with plaintiff as a corporation. Eggert v. Cleveland, 138 Ill.App. 434, 437 (1908); Boatman v. Jordan, 102 Ill.App.2d 55, 60 (1968). Defendant argues that the cases stand only for the proposition that one who has some interest in a corporation is so estopped. But in both Zimmerman Ford, Inc. v. Cheney, ___ Ill.App.2d ___, 271 N.E.2d 682, 684 (1971), and Spreyne v. Garfield Lodge No. 1, 117 Ill.App. 253, 255 (1904), parties having no interest in the corporation were estopped to deny its corporate existence. Thus, the estoppel doctrine is applicable to defendant.

We, therefore, affirm the judgment of the trial court.

AFFIRMED.

MORAN, P.J. and SEARS, J. concur.

70-275

UNITED STATES OF AMERICA

ABST.

State of Illinois)
Appellate Court) ss:
Second District)

1 I.A. 376

At a session of the Appellate Court, begun and held at Elgin, on the 7th day of December, in the year of our Lord one thousand nine hundred and seventy, within and for the Second District of Illinois:

Present -- Honorable THOMAS J. MORAN, Presiding Justice
Honorable GLENN K. SEIDENFELD, Justice
Honorable WILLIAM L. GUILD, Justice
HOWARD K. KELLETT, Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On October 5, 1971 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

No. 70-275

FILED

IN THE
APPELLATE COURT OF THE STATE OF ILLINOIS
SECOND JUDICIAL DISTRICT

OCT 5 - 1971

HOWARD K. KELLETT, Clerk
Appellate Court, 2d District

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	Appeal from the Circuit Court
	)	for the 17th Judicial Circuit
vs.	)	Winnebago County, Illinois
	)	Criminal Division
RENO CARMEN YOUNG,	)	
	)	
Defendant-Appellant.	)	Abstract
	)	
	)	

MR. PRESIDING JUSTICE THOMAS J. MORAN DELIVERED THE OPINION OF THE COURT:

An indictment charging murder, voluntary and involuntary manslaughter was brought against the defendant. With the benefit of counsel, defendant entered a plea of guilty to one count (involuntary manslaughter) and the remaining charges were dismissed.

A petition for probation was denied, the defendant was sentenced from 3 to 10 years in the penitentiary, and this appeal followed.

While the appeal was pending the defendant's counsel (Illinois Defender Project) filed a motion stating that, from a review of the record, it found that the defendant was sufficiently admonished prior to the entry of his plea of guilty and that in view of the defendant's background the sentence imposed was not excessive. The motion concluded that the appeal "would be unsuccessful, time consuming and wholly frivolous" and therefore requested that it, as defendant's counsel, be allowed to withdraw. A copy of the motion was mailed to the defendant on January 11, 1971.

This Court, in its customary practice, mailed a copy of the motion to the defendant and granted him leave to file additional points in support of the appeal. The defendant responded:

> "The nature of my appeal is a reduction of sentence. I was advised and in fact was told by the court that I would not be sentenced on my past record. This is in the transcript! I do, however, feel that I can show where the sentence I received was

both extreme and based on my prior record."

This Court, in accordance with the dictates of Anders v. California, 386 US 738, has carefully reviewed the entire record for any error and concludes that the defendant was properly admonished, that the sentence entered was not excessive, that no other error exists, and that the appeal is frivolous and without merit.

Therefore, the Illinois Defender Project, is granted leave to withdraw as appellate counsel for the defendant. The judgment is affirmed.

JUDGMENT AFFIRMED

Guild and Seidenfeld, J.J. - concur

70-141

UNITED STATES OF AMERICA

1 I.A.3 395

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 6th day of December, in the year of our Lord one thousand nine hundred and seventy-one, within and for the Second District of Illinois:

ABST.

Present -- Honorable WILLIAM L. GUILD, Acting Presiding Justice
Honorable THOMAS J. MORAN, Justice
Honorable MEL ABRAHAMSON, Justice
HOWARD K. KELLETT, Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On December 21, 1971 the Supplemental Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

PUBLISH IN FULL

NO. 70-141

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FILED

DEC 21 1971

HOWARD K. KELLETT, Clerk
Appellate Court, 2d District

PEOPLE OF THE STATE OF ILLINOIS	)	
	)	
Plaintiff-Appellee	)	Appeal from the 16th Judicial Circuit, Kane County
-vs-	)	
	)	
JOHNNY WADE, a/k/a "JAP"	)	Hon. John S. Petersen Judge presiding
Defendant-Appellant	)	

SUPPLEMENTAL OPINION

MR. JUSTICE GUILD delivered the opinion of the court.

The conviction in this case was affirmed and we remanded the case to the Trial Court to conduct a hearing under the provisions of the "Cannabis Control Act" and report back to this court its findings within a short date.

Now, however, in view of The People v. Mc Cabe, Supreme Court Docket #42674, filed Oct. 1971; rehearing denied November 24, 1971, 49 Ill.2d 338 (1971), and The People v. Hudson, Supreme Court Docket #43994, filed , there is no necessity for a hearing under the "Cannabis Control Act."

Therefore, the judgment of the trial court is reversed.

Judgment reversed.

MORAN, P.J. and ABRAHAMSON, J., concur.

70-265

ABST.

UNITED STATES OF AMERICA

1 I.A.3 413

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 7th day of December, in the year of our Lord one thousand nine hundred and seventy, within and for the Second District of Illinois:

Present -- Honorable THOMAS J. MORAN, Presiding Justice
Honorable MEL ABRAHAMSON, Justice
Honorable WILLIAM L. GUILD, Justice
HOWARD K. KELLETT, Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On September 17, 1971 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

PUBL. IN ABSTRACT

NO. 70-265

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

CHARLOTTE PREWOZNIK Plaintiff-Appellee -vs- STANLEY A. DURKA Defendant-Appellant	Appeal from the Circuit Court of the 19th Judicial Circuit, Lake County Hon. Peter L. Melius Magistrate presiding

MR. JUSTICE GUILD delivered the opinion of the Court.

The defendant herein, an attorney, has filed this appeal from a judgment against him entered in favor of the Plaintiff, his former client, for $3,793.98.

The plaintiff testified that Durka was the attorney for her mother's estate in 1961. During that time Durka consummated a loan from the plaintiff with the Freund Dredging Company for $5000 for which a note was given signed by the defendant, and the plaintiff testified that it was also signed by the secretary of the corporation. The plaintiff further testified that the note was for six months and when it was repaid the defendant asked the plaintiff to loan him the $5000 which she did and for which Durka gave her his note. The note was subsequently lost.

Durka made various payments and on October 29, 1964 furnished the plaintiff with his accounting which he entitled "Statement of Account between Stanley A. Durka and Charlotte Prewoznik" showing payments made by him on four occasions in the sum of $300 each, and a charge for attorney services in the sum of $674.50 leaving a balance of $3,793.98 due and at that time Durka sent her his check for that amount. On the same date he wrote her a letter in which he said "In checking back over my records I have found a copy of the original note (which you say you have lost) the note

states clearly that the interest I was obligated to pay was 6% per year. I am accordingly enclosing my check payable to your order in the sum of $3,793.98 to cover the principal balance due and owing together with interest as of this date. . . Unless I hear from you to the contrary I shall assume that the statement of account enclosed is correct and your cashing, endorsing, or retaining of the check enclosed will evidence your acceptance of this accounting in all its particulars." He subsequently stopped payment on the check.

In addition to the above, thirty-two cancelled checks personally issued by the defendant or his wife in payment of principal and interest, several of which were returned for insufficient funds, as well as two Western Union Telegraph Company money order payments were introduced into evidence.

Durka, representing himself, testified that a loan was made to the Freund Dredging Company by the plaintiff on or about July 21st, 1961. He testified further "I believe this note has been paid twice" and that he had searched for the note but could not find it. He further testified as to an attempt by him to transfer two lots in Holiday Hills to her which was not done, and that he had no personal obligations to the plaintiff. He stated "I felt I had a moral obligation which I fulfilled" and that the payments made by him were actually on the Freund Dredging account although they were paid from his personal assets. His explanation of why he stopped payment on the $3793.98 in his statement of account was that "I found that I was overpaying her by more than $2000." The testimony of the defendant also indicates that when the

plaintiff and her attorney advised him that they were going to file a complaint before the Bar Association that the defendant then filed a suit against the plaintiff and her attorney in Chicago "for extortion to try to stop it" and it is at this point that plaintiff filed this suit.

There is nothing in the record to show that the defendant was surprised by the testimony of the plaintiff or the documents produced by her, most of which emanated from the defendant.

Defendant contends that there is a variance between the complaint and the proof adduced by her. This court does not agree. Plaintiff sued on a note allegedly given to her by the defendant personally; by various letters in addition to his "Statement of Account" he acknowledged that the obligation was his. Much extraneous evidence was introduced pertaining to other matters but the trial court found that defendant owed plaintiff the amount set forth in his own written statement to her.

In view of the above, it hardly seems necessary for this court to state that it will not substitute its judgment for that of the trial court which heard the testimony of the plaintiff and the defendant. Other than the testimony of the plaintiff's attorney, who also testified as to the extortion suit filed by the defendant, the only witnesses heard by the trial court were the plaintiff and the defendant. The trial court had the opportunity to observe the demeanor of the two witnesses, had ample opportunity to examine the various documents which in substance substantiated the plaintiff's claim, and was in a far better position to judge the accuracy of the testimony of the two parties than this court could be.

Judgment affirmed.

P.J.MORAN and J.ABRAHAMSON, Concur.

NO. 54464

COSMOPOLITAN NATIONAL BANK, as Trustee under Trust No. 16186, Plaintiff-Appellee, vs. CITY OF CHICAGO, a Municipal Corporation, Defendant-Appellant.	APPEAL FROM CIRCUIT COURT COOK COUNTY ABST. HONORABLE EDWARD F. HEALY, PRESIDING.

MR. PRESIDING JUSTICE LEIGHTON DELIVERED THE OPINION OF THE COURT:

This appeal is to review a judgment which declared that, as applied to appellee's property, appellant's 1957 comprehensive zoning ordinance is null and void. Under the terms of the judgment, appellee was authorized to improve its property with three six-apartment buildings. Although we are asked to resolve two issues, the one which is dispositive of this appeal is whether appellee rebutted the presumption that appellant's zoning ordinance is valid.

Appellee has not appeared in these proceedings. Consequently, we are not aided by a brief or argument giving us its theory of the judgment below. Nonetheless, we will consider this appeal on its merits. See Lynch v. Wolverine Insurance Co., 126 Ill. App. 2d 192, 261 N.E. 2d 466; Daley v. Jack's Tivoli Lounge, Inc., 118 Ill. App. 2d 264, 254 N.E. 2d 814.

Appellee, as a trustee, is the owner of vacant and unimproved real estate situated on the northeast corner of West Addison Street and Oconto Avenue in Chicago. When it acquired title to the property in May 1966, the parties in interest knew that appellant's comprehensive zoning ordinance classified the property as B4-1, a zoning which permitted construction of ten apartments, with the ground floor devoted to commercial use.

On October 10, 1968 appellee filed a complaint for declaratory judgment alleging that it desired to construct three six-apartment buildings on its property; that it had applied for but

was denied an amendment to appellant's zoning ordinance which would have allowed the desired construction and put appellee's land to its highest and best use; and that insofar as appellant's ordinance prohibited this construction, it deprived appellee of its property without due process of law. Appellee prayed for a declaration that it had the legal right to construct three six-apartment buildings on its property and that appellant's zoning ordinance was unconstitutional.

Appellant appeared and filed an answer that denied the material allegations of the complaint and alleged that its zoning ordinance was the result of thorough study; that there was a reasonable relation between the ordinance and the public health, safety, comfort, morals and welfare of the city; and that the ordinance was valid under state and federal constitutions. The answer prayed that appellee's suit be dismissed and that judgment be entered in its favor.

When the cause was heard, appellee offered in evidence 17 exhibits (including 14 photographs) and called two witnesses. One was a beneficiary of its trust and the other was a real estate broker, appraiser and consultant. The beneficiary described the property and its environs; the real estate appraiser, in addition to other testimony, gave his opinion that under appellant's zoning classification the real estate had a value of about $50,000. On the other hand, it was his opinion that if appellee were permitted to construct the three six-apartment buildings, its property would have a value of approximately $72,000. This construction, according to the appraiser, would give appellee's property its highest and best use. From the evidence it appears that the proposed buildings would subject the neighborhood to an increased density of occupancy.

Appellant offered in evidence 11 exhibits, all of them photographs, and called as its witnesses a city planner and a

licensed real estate broker. They gave a description of appellee's property which showed it was surrounded by single family homes. In their opinion, appellee's proposed use of its property would introduce a higher density of occupancy than is warranted in the area of appellee's land. Appellant's real estate broker gave his opinion that under the present zoning, appellee's property had a value of between $40,000 to $45,000. If three six-apartment buildings were constructed on it, the value would be between $70,000 to $75,000. It was the opinion of appellant's witnesses that the highest and best use of appellee's property was under the present zoning. After hearing the evidence, the trial judge took the cause under advisement and later entered a "declaratory judgment order" in which he concluded that the highest and best use of appellee's property was construction on it of three buildings consisting of six bedroom type apartment dwellings, for a total of eighteen apartments in conformity with appellant's R4 zoning classification; and that the provisions of appellant's zoning ordinance, insofar as they restrict construction on and use of appellee's land, was "unreasonable, arbitrary and has not [sic] relation to the public health, morals, safety, comfort or welfare, and constitute an unconstitutional deprivation of ... [appellee's] property."

In determining whether there is a rational relation between a zoning ordinance and public health, safety, welfare or morals, the factors to be considered are use and zoning of nearby property, the characteristics of the neighborhood, the extent property values are diminished and the gain to the public as compared with the hardship imposed on the individual property owner. Lake County v. MacNeal, 24 Ill. 2d 253, 181 N.E. 2d 85. There is a presumption of validity in favor of zoning ordinances adopted pursuant to legislative grant; and one who attacks such

ordinances has the burden of overcoming the presumption with clear and convincing proof that the ordinance is arbitrary and unreasonable and that it is without substantial relation to public health, safety, morals and welfare. Urann v. Village of Hinsdale, 30 Ill. 2d 170, 195 N.E. 2d 643. In this case, we must bear in mind that on facts quite similar, and as it applied in the neighborhood of appellee's land, appellant's ordinance has been held to be a valid enactment. See Goeller v. City of Chicago, 103 Ill. App. 2d 67, 243 N.E. 2d 444.

Concerning the particular applicability of appellant's ordinance to appellee's property, the beneficiary who testified described the purchase of the vacant land, the fruitless effort to improve it consistent with existing zoning and the variations in building construction that has characterized the neighborhood of West Addison Street and Oconto Avenue. Apparently, it was appellee's theory that appellant's grant of zoning changes, amendments and variations for certain multi-dwelling buildings has made enforcement of its zoning ordinance (insofar as it prohibited the proposed use) arbitrary and unreasonable. In support of this theory appellee offered and the court admitted five photographs of apartment buildings situated east of North Harlem Avenue, one block and a half away from West Addison and Oconto Avenue. Other than the testimony identifying them, there was no evidence concerning these buildings.

North Harlem Avenue is a half section line street. It is a natural boundary between zoning classifications. See Mahoney v. City of Chicago, 9 Ill. 2d 156, 137 N.E. 2d 37. Without further evidence, the construction of the multi-dwelling buildings east of North Harlem is not material to the question whether west of the street, and as to appellee's property, the zoning ordinance is valid.

In addition to these five photographs, appellee offered and had admitted, three photographs purporting to show multi-

dwelling buildings situated west of its property. No explanatory evidence accompanied these photographs. We have examined them. They show two-story buildings with garden apartments on the ground floor, evidently constructed under grants of special uses, a provision of appellant's ordinance which admittedly appellee did not invoke. In any event, it is our judgment that the permitted construction of multi-dwelling buildings nearby do not make application of appellant's comprehensive zoning ordinance to appellee's property unreasonable or arbitrary. See Midwest Bank and Trust Company v. City of Chicago, ____ Ill. App. 2d ____, _____ N.E. 2d ____ (No. 53277, 53511 Cons.). The fact that existing zoning made appellee's property less valuable is not ground for holding appellant's comprehensive zoning ordinance unconstitutional. Although value of property is a factor to be considered in determining the reasonableness of a zoning ordinance, it is not determinative of its constitutionality. Cosmopolitan National Bank of Chicago v. City of Chicago, 22 Ill. 2d 367, 176 N.E. 2d 795; Maywood Proviso State Bank v. Village of Berkeley, Cook County, 55 Ill. App. 2d 84, 204 N.E. 2d 144. Therefore, after hearing the evidence the trial court should have denied appellee the declaration it sought. For these reasons, we reverse, with judgment entered in this court in favor of appellant.

REVERSED WITH JUDGMENT FOR APPELLANT.

SCHWARTZ, J. and STAMOS, J., Concur.

Publish Abstract Only.

54820

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. STEVEN SMITH (Impleaded), Defendant-Appellant.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. Hon. James D. Crosson, Presiding.

MR. JUSTICE GOLDBERG delivered the opinion of the court:

Steven Smith (defendant) and Charles Smith, his brother, were indicted for the murder of Homer Mitchell. Charles Smith was tried separately by a jury and found guilty. Defendant was tried by a jury, found guilty and sentenced to a term of 14 to 20 years in the penitentiary. This appeal concerns defendant only.

Defendant raises five points for review. He contends that the State failed to produce sufficient evidence to establish his accountability for the crime; that the evidence did not prove him guilty beyond a reasonable doubt; that he was prejudiced by the display to the jury of wounds incurred by a prosecution witness; that the prosecutor committed prejudicial error in closing argument and that the trial court erred in not granting defendant's motion for new trial based upon newly discovered evidence.

On May 24, 1969, Homer Mitchell was shot and killed in an alley located between Normal and Parnell Streets near 68th Street in Chicago. At trial it was not disputed that Charles Smith had fired the fatal shotgun blasts. Two eyewitnesses to the murder testified for the State.

Melvin Anglin stated that on May 24, 1969, he was coming from his girl friend's house when he met Homer Mitchell at 66th and Normal Streets. The two of them walked south through the alley. A short distance south of 68th Street they encountered a group of boys in the alley including defendant and Charles Smith. Charles had a shotgun but the witness, paying all attention to Charles, was not able to tell whether defendant was carrying a weapon. At this point, one of the members of the group said: "Let them talk, they don't have no guns." Charles Smith then pointed his shotgun at decedent and the witness. Mitchell pushed the shotgun aside and was shot twice by Charles, who then fired at the witness. Anglin fled but was struck in the head, hand and arm.

Anglin also testified that Donnie Gray, the State's second witness, was in the group. Gray was standing on the west side of the alley near a fence with Charles Smith. Defendant was on the east side of the alley in a gangway.

Donnie Gray testified that he was in the alley at the time of the shooting. As Mitchell and Anglin came down the alley, Charles and Steven ran through the adjacent garage and gangway and returned with weapons. Charles had a shotgun and defendant had a pistol. Gray testified that he saw Charles cross the alley and hold the shotgun up as Mitchell and Anglin approached. Charles shot Mitchell as he and Anglin stopped. He shot at deceased again, missed and then turned and fired upon Anglin. During the shooting, defendant stood with the pistol at his side and did not fire. The witness remained standing next to Charles. After the shooting, Charles and defendant went into the garage behind their home.

The defendant called five witnesses including his wife and sister. He did not testify in his own behalf. Defendant's sister saw him dancing at a birthday party in the dining room of their mother's home at 6812 South Normal two minutes before the shots were heard. She ran out to the alley but did not see defendant there. A neighbor, who lived next door, heard the shots and ran out. She then saw defendant emerging from the back door. Defendant's wife testified that defendant never left the birthday party. She ran out of the rear door to the alley but fainted when she saw the body of the deceased. A young neighbor testified that he was present and picked her up. He carried her back to the house and gave her to defendant who was then on the back porch. Another lady, who was a guest at the party, testified that she had just finished dancing with defendant when the shots were heard.

The threshold problem is the sufficiency of the evidence of guilt. This involves a consideration of the testimony of the alibi witnesses. It has been held that the burden of proof in a criminal case never shifts to the defendant and that it is always the duty and the burden of the State to prove guilt beyond a reasonable doubt upon due consideration of all of the evidence including that of alibi. People v. Perroni, 14 Ill.2d 581, 592 cert. denied, 359 U.S. 1004 reh. denied, 359 U.S. 1005; People v. Wheeler, 5 Ill.2d 474, 483; People v. Moscatello, 114 Ill.App.2d 16, 29; People v. Flynn, 89 Ill.App.2d 328, 331.

This record presents a situation in which the jury heard conflicting evidence. Some of the evidence showed that defendant was present in the alley. Other evidence tends to establish that he was at a birthday party at the time of the shooting. In such cases of conflicting evidence, the mere presentation of alibi evidence does not "***in and of itself, constitute reasonable doubt***" of guilt. People v. Wright, 126 Ill.App.2d 91, 97.

Where the evidence conflicts and a defense of alibi is asserted, it is the function of the jury to determine the credibility of the witnesses. The jury has the obligation to consider all the evidence tending to prove an alibi, together with all other evidence, and to determine whether or not there is a reasonable doubt of guilt. Unless the verdict is palpably contrary to the weight of the evidence, or so unsatisfactory as to justify a reasonable doubt of guilt, it should not be disturbed by a reviewing court. People v. Hairston, 46 Ill.2d 348, 366; People v. Tillman, 116 Ill.App.2d 24, 31; People v. Moscatello, 114 Ill. App.2d 16, 29; People v. Boyce, 113 Ill.App.2d 266, 273.

The trier of fact, whether judge or jury, is not obliged to accept evidence of an alibi even though given by a greater number of witnesses than produced by the State. People v. Catlett, 48 Ill.2d 56, 64; People v. Bracey, 129 Ill.App.2d 57, 62; People v. Woods, 114 Ill.App.2d 348, 356. We have made a painstaking examination of the entire record. We conclude that the prosecution evidence is ample to support the verdict of guilt beyond a reasonable doubt.

We will next consider the sufficiency of the evidence as regards accountability of defendant for the murder. The statute governing accountability (Ill.Rev.Stats. 1969, ch.38,par.5-2), provides:

> Par.5-2 "A person is legally accountable for the conduct of another when:
>
> "(c) Either before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense."

Defendant argues that the State did no more than prove that he was present when his brother murdered Homer Mitchell.

As defendant indicates, mere presence at the scene of the offense is not sufficient in and of itself to impose guilt upon an individual. People v. Washington, 121 Ill.App.2d 174, 181; People v. Millis, 116 Ill.App.2d 283, 288; People v. Williams, 104 Ill.App.2d 329, 335. However, where there is evidence of conduct or other surrounding circumstances which shows a design on the part of the defendant to aid and abet or assist in perpetration of the crime, he can be held accountable for the actions of others even without active participation in the physical acts of the offense. People v. Spagnola, 123 Ill.App. 2d 171, 185; People v. Littleton, 113 Ill.App.2d 185, 189. In fact, proof of the presence of defendant at the commission of the crime without disapproving or opposing it is competent evidence that he aided or abetted in perpetration of the crime. People v. Cole, 30 Ill.2d 375, 379. Even association of defendant with a group armed with a deadly weapon is competent evidence of participation in the crime and of guilt. People v. Bracey, 110 Ill.App.2d 329, 338.

The evidence presented by the State from which the jury could find defendant accountable consists primarily of the eyewitness testimony of Melvin Anglin and Donnie Gray. Anglin testified that he knew defendant and his brother; that defendant was present in a gangway next to the alley where defendant's brother stood with a shotgun; that defendant's brother shot decedent twice with the shotgun before shooting the witness, Anglin.

Donnie Gray testified that he was in the alley with defendant and his brother and he corroborated the details of the shooting as stated by Melvin Anglin. Further, he testified that when Mitchell and Anglin were seen walking down the alley, Charles Smith and defendant went through a garage and gangway

and returned with weapons. He noted that Charles had the shotgun and defendant had a pistol.

This testimony stands without contradiction. It brings the case at bar directly within the principles established in People v. Hill, 39 Ill.2d 125, 135 where the court held:

> "Where proof in a criminal case 'shows that a person is present at the commission of a crime without disapproving or opposing it, it is competent for the jury to consider this conduct in connection with other circumstances and thereby reach the conclusion that he assented to the commission of the crime, lent to it his countenance and approval and was thereby aiding and abetting the same.'"

In the instant case, the jury had amply sufficient evidence to conclude that defendant, by his actions, had aided and abetted his brother in the murder of Homer Mitchell and that defendant's accountability had been proven beyond a reasonable doubt. We cannot say that the jury's verdict is against the manifest weight of the evidence. People v. Hill, 39 Ill.2d 125, 135; People v. Richardson, 32 Ill.2d 472, 477; People v. Spagnola, 123 Ill.App.2d 171, 185; People v. Bracey, 110 Ill.App.2d 329, 338.

Defendant's third contention is that it was reversible error for the trial court to permit the State's witness, Melvin Anglin, to display to the jury the wounds he received from the shotgun fired by Charles Smith. Defendant argues that this constituted error because the wounds were irrelevant to the issue of guilt and their display was inflammatory and prejudiced the jury.

The witness, Melvin Anglin, was wounded virtually simultaneously with occurrence of the homicide. He was one of two eyewitnesses to the shooting so that his testimony was directly relevant to the murder. Even though infliction of the wounds

might constitute a separate criminal offense, that does not make the fact of their existence irrelevant. The physical evidence of the wounds served to corroborate the testimony of the witness; which included the commission of the homicide and the presence of defendant at the scene.

In People v. Conrad, 81 Ill.App.2d 34, 46 aff'd. on other grounds, 41 Ill.2d 13, the court said:

> "The test of admissibility of evidence is the connection of the facts proved with the crime charged, and whatever testimony tends directly to show the defendant guilty of the crime charged is competent although it tends to show him guilty of another offense."

Additional decisions enunciating this principle are People v. Palmer, 47 Ill.2d 289, 296; People v. Wilson, 46 Ill.2d 376, 380 and People v. Dewey, 42 Ill.2d 148, 157.

The record fails to substantiate defendant's claim of prejudice resulting from demonstration of these wounds. They were merely scars from shotgun pellets located on the witness' hand and arm. They were apparently not extensive nor was their aspect particularly gruesome. Further, it is authoritatively established that relevant evidence which has a tendency to establish facts in controversy should be admitted and should not be excluded merely because it might prejudice the accused. People v. Hairston, 46 Ill.2d 348, 372; People v. Yonder, 44 Ill.2d 376, 391; People v. Horne, 110 Ill.App.2d 167, 173; People v. Conway, 85 Ill.App.2d 165, 170.

In addition, questions relating to the extent and the manner of presentation of demonstrative evidence are within the discretion of the trial judge and the exercise of that discretion will not be interfered with unless there has been an abuse to the prejudice of defendant. People v. Nicholls, 42 Ill.2d 91, 99; People v. Lawrence, 126 Ill.App.2d 202, 208; People v. Skidmore, 69 Ill.App.2d 483, 488.

The trial judge was acting well within the bounds of proper discretion in permitting these wounds to be displayed to the jury. We find no prejudicial error in this regard.

Defendant's next contention is based upon alleged improper comments by the prosecutor during closing argument. Defendant quotes three separate instances in which the State's Attorney allegedly misstated the law relating to accountability. As revealed by the record, defendant's attorney did not object to the first two statements and therefore the point is waived. People v. Hudson, 46 Ill.2d 177, 197; People v. Hampton, 44 Ill. 2d 41, 46; People v. Gullickson, 115 Ill.App.2d 157, 166; People v. Fortson, 110 Ill.App.2d 206, 216. Furthermore, upon reading these two comments, we find them to be well within the bounds of fair and proper argument. People v. Wilson, 46 Ill.2d 376, 381.

In the third remark to the jury, which was objected to by defendant's attorney, the prosecutor said:

> "***I am asking you to follow the instructions of Judge Crosson. I am asking you to follow the letter of the law, the law which says that if you believe that he was there he is responsible, he is guilty of murder."

Immediately after this remark, defendant's attorney objected and the trial judge told the jurors that he would instruct them on the law. An instruction correctly stating the law of accountability was given to the jury. Any conceivable prejudice which defendant may have suffered as a result of the prosecutor's comment was completely cured by proper instructions from the trial court. People v. Stokes, 46 Ill.2d 325, 329; People v. Hampton, 44 Ill.2d 41, 46; People v. Pecora, 107 Ill.App.2d 283, 300.

Defendant's final contention revolves about denial of his motion for a new trial based upon newly discovered evidence.

This evidence is reflected in the affidavit of one Lonnie King, who stated that he had overheard a conversation on July 4, 1969, between the State's witness Donnie Gray and one Charlie Adkins in which Gray admitted to Adkins that he had not been present in the alley at the time of the shooting. Adkins allegedly told Gray that he should testify at trial that he was in the alley and that he saw Steven and Charles Smith shoot Homer Mitchell and that this would serve the purpose of getting the Smith brothers "off the streets."

The law of Illinois with reference to the granting of a new trial upon newly discovered evidence has been correctly described as, "unmistakably clear." People v. Brown, 125 Ill. App.2d 336, 342. The pertinent principles may be outlined as follows:

1. The burden rests strongly upon the movant to rebut the presumption that the verdict is correct. Therefore, "***a request for new trial based on newly discovered evidence is subjected to the most cautious and circumspect exploration***." People v. Brown, 125 Ill.App.2d 336, 342.

2. The evidence must have been obtained since the trial and it is required to be of such character that it could not have been discovered in apt time for use at trial by the exercise of due diligence. People v. Baker, 16 Ill.2d 364, 374; People v. Johnson, 123 Ill.App.2d 69, 75; People v. Burrington, 101 Ill.App.2d 230, 235.

3. The new evidence must be more than cumulative. It must present an element of finality so that it will probably change the result in event of a retrial. People v. Baker, 16 Ill.2d 364, 374; People v. Brown, 125 Ill.App.2d 336, 342; People v. Burrington, 101 Ill.App.2d 230, 235.

4. Determination of these various elements and of the merits of the motion is a matter of discretion of the trial judge and his decision may not be disturbed upon review without a showing of an abuse of discretion. People v. Baker, 16 Ill.2d 364, 373; People v. Branscomb, 116 Ill.App.2d 385, 397; People v. Burrington, 101 Ill.App.2d 230, 234.

The mere statement of the above established principles shows that the trial judge was completely correct in his denial of the motion for new trial upon this ground. The new evidence falls far short of sufficient finality to permit the conclusion that it might probably result in defendant's acquittal. For that reason, People v. Pirovolos, 126 Ill.App.2d 361, the one authority cited and relied upon by defendant in this regard, is inapplicable here. In that case the evidence, "***could have changed the result of the trial." 126 Ill.App.2d 361 at 364. In the case at bar, the newly discovered evidence is not material to the issue of defendant's guilt. At best, it would serve only as an attack upon the credibility of the witness Donnie Gray. It has been repeatedly and specifically held that, "***evidence which will only serve the purpose of impeachment is not a justification for granting a new trial on the grounds of newly discovered evidence." People v. Johnson, 123 Ill.App. 2d 69, 75. See also additional citations set forth at that point. We must necessarily conclude that the trial judge did not abuse his discretion in denying the motion for new trial based upon newly discovered evidence.

Upon full consideration of all of the points raised by defendant and all of the authorities cited and predicated upon the entire trial record, we conclude unhesitatingly that defendant had a fair trial presided over by an able and consci-

entious judge and that this conviction and judgment should be affirmed. The judgment is accordingly affirmed.

Judgment affirmed.

BURKE, P. J. and LYONS, J. concur.

1 I.A.3 571

MAR 20 1972

55467

ABST.

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
v.
RUBEN SCHNEXNYDER,
Defendant-Appellant.

Appeal from the Circuit Court of Cook County.

Frank J. Wilson, AJ.

MR. JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT:

The defendant, Ruben Schnexnyder, was indicted for the unlawful sale of narcotic drugs. Prior to his trial he moved to dismiss the indictment. He asserted that he had been denied due process of law because of the lapse of time between the purported sale and his arrest was so long that it was impossible for him to prepare his defense. Following a hearing, at which testimony was given by the police officer to whom the sales had allegedly been made and by the officer who made the arrest, the court denied the defendant's motion.

The defendant then stated that he wished to withdraw his plea of not guilty and enter a plea of guilty to the lesser included offense of possession of narcotics. The State agreed and the court informed the defendant of the consequences of the plea of guilty. He stated that he understood the court's admonition. He was found guilty and sentenced to serve not less than three nor more than four years in the penitentiary.

Two contentions are raised on appeal: first, that it was error for the court to deny his motion to dismiss the indictment and, second, that the court erred in not granting him a continuance (which he had requested) to procure police reports to refresh the memory of the police officer to whom the sale was made.

This court will not consider either of these issues. A plea of guilty is conclusive; following such a plea, the trial court need do nothing but enter judgment and sentence. Kercheval v. United States, 274 U.S.220, 47 Sup.Ct. 482 (1927); People v. White, 116 Ill.App.2d 180, 253 N.E.2d 654 (1969). A defendant who pleads guilty waives all irregularities except those matters pertaining to the jurisdiction of the court. McMann v. Richardson, 397 U.S. 759, 90 Sup.Ct. 1441 (1970); People v. Dennis, 34 Ill.2d 219, 215 N.E.2d 218 (1966).

The defendant's assignment of error has been waived. He was fully apprised of the consequences of his guilty plea and neither of the asserted errors concern the jurisdiction of the court.

The judgment is affirmed.

Affirmed.

McNamara, PJ., and McGloon, J., concur.

(24540—4M—9-70) 160-o

STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the State of Illinois, sitting at Springfield:

PRESENT

HONORABLE SAMUEL O. SMITH, Presiding Judge

HONORABLE HAROLD F. TRAPP, Judge

HONORABLE JAMES C. CRAVEN, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 8th day of OCTOBER A. D. 1971, there was filed in the office of the Clerk of the Court an opinion of said Court, in words and figures following:

General No. 11482 Agenda No. 71-101

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

People of the State of Illinois,	)	
	)	
Plaintiff-Appellee	)	Appeal from Circuit Court
	)	
vs.	)	Champaign County
	)	
George Gupton Swinney,	)	
	)	
Defendant-Appellant	)	

Smith, P.J.

The Illinois Defender Project moved to withdraw as defendant's counsel and accompanied the motion with a brief in conformity with Anders v. State of California, 386 US 738, 18 L ed 2d 493, 87 S Ct 1396. The record shows proof of service of the motion and of the brief filed upon the defendant. The motion was continued for sixty days for the defendant to file any other further or additional suggestions, and notice to him of this opportunity was given. None were filed.

The defendant first pleaded not guilty and then withdrew it and pleaded guilty. The court was informed that the State's Attorney's office had promised not to oppose probation if the defendant pleaded guilty and the court then informed the defendant

that the State's Attorney's promise was not binding on the court. The plea of guilty was accepted and the judgment was entered on the plea. Before accepting the plea, however, the trial court admonished the defendant with rather meticulous observance of the requirements of Supreme Court Rule 402 in all of its aspects. A jury waiver was signed. On the probation hearing, the probation officer's report, as well as testimony of the defendant's mother, was heard and considered by the court. We find in this case a full explanation of the defendant's rights as well as a full inquiry by the court into the factual circumstances of the burglary. Police officers found him inside a TV store and the defendant's attorney stated that two investigators had corroborated the facts as stated by the State's Attorney.

On the probation hearing, the State's Attorney stated that he had promised not to object to the defendant's petition for probation. He stated however that he had promised to do this on the belief that the defendant had never been in trouble before and that he was in high school. These were not the facts. The defendant was seventeen years old, had been declared a juvenile delinquent in 1967, had been put on probation, had that probation revoked in 1967, and had been committed to the Illinois Youth Commission. He had been paroled and returned to that Commission twice. The probation officer's report recommended that probation be denied. The trial court granted probation for three years, but as a condition required that the defendant serve 6 months at the Illinois State Farm in Vandalia. It is this portion of the sentence which is in question.

While the State's Attorney had stated his original misinformation of the defendant's record, he further stated that he would stand by his recommendation and representation to the defendant that he would not oppose probation. A reading of the trial court's statement indicates that he did not rely on this reluctant recommendation of the State's Attorney so much as he did on the nature of the offense and the probation officer's report. He had previously advised the defendant that the court would not be bound by a State's Attorney's promise to recommend probation. While the withdrawal of a not guilty plea and the entry of a guilty plea should not be couched in ambiguity or misunderstanding or induced by promises direct or indirect which are not kept, there seems to be a lack of that element in this case. It is undisputed that the defendant clearly understood that no matter what the State's Attorney recommended, the trial court would impose the sentence warranted by the evidence and the defendant's record. It seems clear that the action of the trial court was proper.

It was the conclusion of the Defender Project that no error was committed in the trial court and that this appeal is therefore without merit and frivolous. In the discharge of our duties, we, too, have examined and read the record and agree that an appeal is without merit. Accordingly, the petition of the Illinois Defender Project to withdraw as counsel for the defendant-appellant is allowed and the judgment of the trial court is affirmed.

Affirmed.

Trapp, J. and Craven, J. concur.

No. 53775

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

VIDAS YUDEN and MINNIE YUDEN, his wife, Plaintiffs and Counter Defendants-Appellees, vs. RICHARD BINKOWSKI and KEITHA BINKOWSKI, his wife, Defendants and Counter Plaintiffs-Appellants.	Appeal from the Circuit Court of Cook County, Illinois. Honorable George N. Leighton, Presiding Judge.

EBERSPACHER, P. J.

This case began as a suit by Vidas Yuden and his wife against the appellants, Richard Binkowski and his wife, to foreclose a mortgage on real estate which the Yudens sold to Binkowskis on contract for warranty deed in August, 1963. An answer was filed and as a separate pleading, the Binkowskis filed a counter-complaint for recission of the contract by which the real estate was sold.

The essence of Binkowskis' claim is stated in their amended counter-complaint in which paragraph 3 thereof alleged:

> "That to induce Binkowski to enter into the contract aforesaid, Yuden falsely and fraudulently and with intent to deceive and defraud Binkowski, contemporaneously with entry into said contract, represented to Binkowski that he had corrected or was in the process of correcting all violations of the Building Code of the City of Chicago, in such case made and provided, as it related to the subject property, that all of said work was performed pursuant to certain plans and specifications prepared by a licensed architect, which said plans had been approved and accepted by the Building Commissioner of the City of Chicago and that a building permit issued therefor. He further represented to Binkowski that certain work was then in progress by an electrical contractor and that when said work was completed, the subject real estate would then be free of any and all building violations and would conform in all respects to the Building Code of the City of Chicago."

Paragraph 4 of the amended counter-complaint alleged;

> "That relying on said representations, Binkowski was induced to enter into said contract for warranty deed to purchase the said real estate. . ."

Paragraph 5 of the counter-complaint alleged that the Binkowskis made no independent investigation as to the truth of these representations but relied wholly upon them as made by Yuden.

The facts of this controversy as found by the trial court are well stated in the trial court's memorandum and are as follows:

> "In July, 1963, Vidas Yuden and Minnie Yuden were owners of a three-story building containing 11 apartments, situated at 4318 North Sheridan Road in the City of Chicago. When they purchased the property in 1954, they paid the sum of $65,000.00. In February, 1962, a team inspection was made and building code violations were found by agents of the city. A one-page, three paragraph notice of these were given Mr. Yuden; and he employed a general contractor to do the work required. The contractor obtained an architect who prepared plans. In addition, Mr. Yuden employed a carpenter who did some of the work required to correct the code violations described in the notice. The notice was studied by the lawyer for the Yudens who construed it as meaning that if a basement apartment were discontinued, only a part of the notice required compliance. According to Mr. Yuden,'. . . . the work was done'. In July, 1962, a re-inspection of the building was made and the property was found 'In Full Compliance'.
>
> Sometime in July, 1963, the Yudens listed their property for sale with J. Kruger and Company, Realtors. In that month the Binkowskis saw the property advertised in a newspaper. They contacted the broker; and from him they learned the address of the building. Mr. and Mrs. Binkowski went to 4318 North Sheridan Road and looked at the property from the outside. This interested them enough; so that through the broker, they made arrangements to inspect the interior of the building. As a result of these arrangements, Mr. and Mrs. Binkowski went to 4318 Sheridan Road and there on their first visit met Mrs. Yuden who showed them the Yuden apartment and the one other. Later, Mr. and Mrs. Binkowski met Mr. Yuden for the first time. On these various visits to 4318 North Sheridan Road, Mr. and Mrs. Binkowski were shown the entire building including the roof which they inspected; and they saw the basement containing heating equipment and other facilities kept in that portion of the property.
>
> During the visits to the property, Mr. Binkowski was given every opportunity to inspect the entire building and see anything he wanted to inspect. He saw the basement apartment that was not then being used because of non-compliance with the Building Code of the City of Chicago. The basement had been the subject of damage which was called to the attention of Mr. Binkowski. At the conclusion of these visits and inspections, Mr. Binkowski expressed a desire to purchase the building. Mr. Yuden told Mr. Binkowski that he could have his own lawyer prepare the contract.

Accordingly, Mr. Thomas Gordon, attorney for the Binkowskis, prepared a real estate contract for the price and in accordance with terms of payment agreed upon by the parties. As a provision of the contract, there was inserted a series of paragraphs by which the Yudens, in substance, guaranteed that the building contained no violations of the Chicago Building Code. This contract was forwarded to the Yudens; but they refused to sign the agreement because of the guarantee provisions. As a result of this refusal, Mr. Binkowski lost interest in the purchase of the building. He began looking for another property to purchase.

A few days later an agent for the real estate broker called him and inquired why the broker had not heard from Mr. Binkowski. Mr. Binkowski then told the agent that he had talked to his lawyer, and in the meantime, had gone to the Chicago Building Department where a clerk told him there were code violations on the building. After telling the real estate agent this fact, the agent assured Mr. Binkowski that he would look into the matter and arrange an appointment with Mr. Yuden. A short time later, another meeting between Mr. Binkowski and Mr. Yuden took place.

This meeting was attended by the two Yudens and the two Binkowskis. Mr. Binkowski there told Mr. Yuden that he had gone to the Building Department and had learned there were violations against the building. Mr. Yuden '. . . became very excited and he said there was absolutely no violations against this building and he had done everything that was necessary and . . . He's wanted to do everything that's required that was done and everything was necessary that it was done, and he said---He even said he would give me a letter stating everything was done and also he says I could rely on him and -- which I did. I believed him and . . .'

This conversation resulted in Articles of Agreement drawn by Mr. Yuden's attorney and later submitted to the Binkowskis for their signature. It was dated August 7, 1963. Mr. Binkowski did not sign it when he first received it because '. . . there was no letter, . . .' A short time later, when he said he received '. . . the letter. . .' which is in evidence as counter plaintiff's exhibit 1, he and Mrs. Binkowski signed the Articles of Agreement.

The letter in question was dated August 13, 1963. It was written on the stationery of the law firm representing the Yudens and addressed to Mr. Thomas Gordon, attorney for the Binkowskis. The letter was typed by a secretary in the office of the Yudens' attorney handling the Yuden matter. This letter was either dictated by Mr. Lieberman or prepared by his secretary at his direction. The letter was as follows:

Dear Mr. Gordon:

Enclosed herewith is photostatic copy of contractor's letter.

I have examined the plans for the work which was done at the premises and the changes made to conform to code.

The plans are stamped "Department of Buildings, conforms to Zoning Ordinance, Aug. 5, 1963" and signed by authorized personnel of the building department.

Very truly yours,

JACOBS, RIBSTEIN & LIEBERMAN

/s/ Eugene Lieberman

EUGENE LIEBERMAN
per L. J.

EL:lj
Encl.

The Articles of Agreement were signed by the Binkowskis on August 16, 1963 and notarized by their attorney, Mr. Gordon. The real estate transaction was then closed in the offices of the real estate broker on August 28, 1963, with proration date and transfer of possession on September 1, 1963. Thereafter, the Binkowskis took possession of the building, collected rents and have retained control of the property since then.

By July, 1965, the Binkowskis had paid a sum sufficient to entitle them to a deed to the property. Accordingly, a trust deed and note were prepared and executed by the Binkowskis, in accordance with terms of the Articles of Agreement. The trust deed and note secured the balance of the purchase price amortized over a period beginning August 7, 1965, and ending May 7, 1977, with interest at 5 1/2%. The trust deed was recorded March 3, 1966.

On February 11, 1966, a short time before the trust deed was recorded, Mr. Binkowski received from the Inspectional Services, Building Department, City of Chicago, a notice of inspection of his building which called his attention to violations of the Chicago Building Code. This notice consisted of three pages and 14 paragraphs. Upon receiving this notice, Mr. Binkowski communicated with Mr. Yuden and with Mr. Yuden's lawyers.

Thereafter, Mr. Binkowski made further inquiries at the Chicago Building Department and learned of the notice of violations dated February 15, 1962. A careful comparison of the 1962 notice with the one Mr. Binkowski received in 1966 discloses that all the work was not done by the Yudens. The Binkowskis then employed a licensed architect and contractor who corrected all the building violations at a gross cost in excess of $12,000.00. Mr. Binkowski then stopped making payments on the purchased money mortgage that had been secured by the trust deed. Because of the defaults on the mortgage payments, on July 14, 1966, the Yudens filed suit to foreclose. Before filing an answer to the complaint, the Binkowskis filed a petition praying the court to designate a depository to whom the payments required under the mortgage could be made pending the suit. The petition was denied on September 29, 1966; and, thereafter, all the payments due under note and trust deed were paid to the Yudens '. . . without prejudice to the rights of the parties hereto. . .'."

The question of law raised on this appeal is whether the facts show by the requisite degree of proof that the Yudens committed fraud and deception in the sale of the building so as to entitle the purchasers, Binkowskis, to relief by recission of

the contract and compensatory damages.

If any false representations were made by Yudens, it was at the meeting between the Yudens and the Binkowskis held after Binkowski had gone to the Building Department and had been advised that there were violations against the property. Binkowski, when questioned by his attorney, testified regarding this meeting as follows:

> "Q. First of all, tell me what you told him. Just give me the conversation as best you can recall.
>
> A. I had told him I had gone to the Building Department and they had told me there were violations against the building, and that's the way I told him.
>
> Q. What did he say to you?
>
> A. Well, at that time he became very excited and he said there was absolutely no violations against this building and he had done everything that was necessary and - - -
>
> Q. This is what he said to you?
>
> A. Yes, this is what he said to me. He says - - -
>
> Q. Okay.
>
> A. He's wanted to do everything that's required, that was done, and everything that was necessary, that it was done, and he said - - He even said he would give me a letter stating that everything was done and also he says I could rely on him and - - which I did. I believed him and - - -"

The question to be determined is whether these statements were of material facts, known by the Yudens to be false and made to induce the Binkowskis to purchase a building known to have code violations. The Supreme Court in Roda v. Berko, 401 Ill. 335, 81 N.E. 2d 912 (1948) at page 914 stated:

> "A misrepresentation, in order to constitute fraud which will warrant a court of equity in rescinding a contract, must contain the following elements: It must be a representation in the form of a statement of a material fact, made for the purpose of inducing the other party to act. It must be false and known by the party making it to be false, or not actually believed by him, on reasonable grounds, to be true. The party to whom it is made must be ignorant of its falsity, must reasonably believe it to be true, must act thereon to him damage, and in so acting must rely on the truth of the statement."

At the time that Yuden made the statement to Binkowski he had good reason to believe that he had complied with all of the work required by the 1962 notice from

the Building Department. He hired a general contractor, who in turn obtained an architect. In addition, he employed a carpenter and paid him for the work which he was told by his lawyer was required by the notice. He went to court and learned that the Municipal Court of the City of Chicago found his building "In Full Compliance". When he made the statement to Binkowski, he had good and reasonable grounds to believe it was true. The trial court concluded that the 1966 notice shows that not all the work required in 1962 was done by Yudens, but that even the two representatives of the Building Department who testified had great difficulty in distinguishing the two notices and that a layman would understandably believe he had complied, particularly in light of the municipal court action. Mr. Binkowski testified that he had not expected Yudens to do any work on the premises after he took possession.

Additionally, a statement of a conclusion of law cannot form the basis of an action for fraud. In Scott v. Wilson, 15 Ill. App. 2d 456, 146 N.E. 2d 397 (1958), a building was sold in which a basement apartment was being rented. It turned out that the basement apartment was in violation of the city zoning ordinance. There the court held the representation of a valid basement apartment was a representation of law not of fact. The case at bar is likewise a question of a statement of law in regard to whether there were or were not code violations.

In regard to the letter from Yudens' attorney to the Binkowskis' attorney, it is contended by Binkowskis that this letter was also a representation that "all the work was done". We agree with the trial court that it does not carry this meaning.

The trial court's findings of fact were supported by the evidence and will not be distrubed.

We find that appellant failed to establish fraud to the requisite degree of proof, i.e. clear and convincing evidence, Bennett v. Hodge, 374 Ill. 328.

Judgment affirmed.

CONCUR: /S/ Charles E. Jones

CONCUR: /S/ George J. Moran

(24540—4M—9-70) 160-o

STATE OF ILLINOIS

ABST.

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the State of Illinois, sitting at Springfield:

PRESENT

HONORABLE SAMUEL O. SMITH, Presiding Judge

HONORABLE HAROLD F. TRAPP, Judge

HONORABLE JAMES C. CRAVEN, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 8th day of October A. D. 1971, there was filed in the office of the Clerk of the Court an opinion of said Court, in words and figures following:

General No. 11307 Agenda No. 71-98

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

People of the State of Illinois, Plaintiff-Appellee	)	Appeal from Circuit Court Adams County
vs.	)	
Steven Allen Hanna, Defendant-Appellant	)	

Smith, P.J.

The Illinois Defender Project moved to withdraw as defendant's counsel and accompanied the motion with a brief in conformity with Anders v. State of California, 386 US 738, 18 L ed 2d 493, 87 S Ct 1396. The record shows proof of service of the motion and the brief filed upon the defendant. The motion was continued for sixty days for the defendant to file any other further or additional suggestions and notice to him given. None were filed.

The defendant was tried before a jury for an attempted jail escape, found guilty, and sentenced from one to three years in the penitentiary. The evidence shows that while in custody his cell door was opened to allow another prisoner to enter. The

defendant rushed out, struggled with the jailer and placed a sharp object at his neck. Another deputy sheriff shot the defendant in the leg and he surrendered. The testimony of the deputy sheriff was supported and corroborated by three prisoners. In defense, the defendant testified that he was married in jail on that day, that he did not try to escape, but only wanted to get out of the cell to telephone his wife. It is at once apparent that the determination of the truth was a factual question determined by the jury and its determination is not against the manifest weight of the evidence.

In like manner, the suggestion that the defendant was not brought to trial within the 120-day statute is without merit. The offense was committed on September 17, 1969. On arraignment the cause was continued to November 7. On motion of the defendant, the cause was again continued until December 4, 1969. Trial commenced on February 9, although 120 days had expired since the date of the offense. The statutory period was broken by the defense motion made on November 7 and began to run anew on December 4. There was no violation of the 120-day statute. It was the conclusion of the Defender Project that no error occurred in the trial court and that this appeal is therefore without merit and frivolous.

In the discharge of our duties, we, too, have examined the record and agree that an appeal in this case is without merit. Accordingly, the petition of the Illinois Defender Project to withdraw as counsel for the defendant-appellant is allowed and the judgment of the trial court is affirmed.

Affirmed.

Craven, J. and Trapp, J. concur.

11/23

IIA 3821

(24540—4M—9.70) 160.o

STATE OF ILLINOIS

ABST.

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the State of Illinois, sitting at Springfield:

PRESENT

HONORABLE SAMUEL O. SMITH, Presiding Judge

HONORABLE HAROLD F. TRAPP, Judge

HONORABLE JAMES C. CRAVEN, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 23rd day of November A. D. 19 71, there was filed in the office of the Clerk of the Court an opinion of said Court, in words and figures following:

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

General No. 11425 Agenda 71-87

Ellsworth-Stewart, Inc.,

Plaintiff-counterdefendant-Appellee,

vs.

M. Fuat Tigrak,

Defendant-counterplaintiff-Appellant.

Appeal from Circuit Court Champaign County

PER CURIAM

Plaintiff, a contractor, that had done certain plumbing, heating and air-conditioning work on the defendant's residence sued to collect funds due. In Count I plaintiff alleged that it was employed by the owner to do certain work and that pursuant to the employment it did furnish plumbing, heating and air conditioning equipment and labor, thereby improving the plaintiff's property; that the value of the work performed and materials was in a specified amount just over $22,000. The owner had made a payment slightly in excess of $10,000, leaving a balance due of $12,223.49. By this Count the plaintiff sought recovery of that amount together with interest. Count II alleged the same work and the same indebtedness, but was based upon an alleged oral contract between the parties. Count III again made some of the same allegations

but further alleged the existence of a written contract, its modification by an oral agreement and the understanding between the parties that the written contract would have no binding effect as between the parties; that it was entered into for the purpose of securing financing and that the oral contract would, in fact, be determinative of the rights and obligations of the parties. Count IV of the alternative pleadings alleged the written contract together with certain additions or deletions applicable thereto, resulting in the same net alleged indebtedness.

The owner counterclaimed alleging failure of contractor to follow the plans and specifications and that the work was done in an unworkmanlike manner.

Substantial and conflicting evidence was introduced. A jury returned a general verdict for the plaintiff in the amount of $12,000 and found against the defendant owner on the counterclaim. Judgment was entered on the verdict and upon denial of the post-trial motion, this appeal was filed by the owner. There is a cross appeal by the contractor asserting that it is entitled to statutory interest from June 1, 1968 to the date of the judgment in accordance with the provisions of section 2, ch. 74, Ill. Rev. Stat. (1967).

The appellant asserts that the complaint was insufficient as a matter of law; that improper evidence was admitted as to the parole agreement between the parties, the substantive effect of which was to vary the terms of the written contract; that the jury was improperly instructed; and finally that the verdict was against the manifest weight of the evidence.

We affirm.

It is fundamental that a plaintiff may make alternative allegations. Where several grounds for recovery are pleaded in support of the same demand, whether in one or several counts, a verdict rendered for that demand is not to be set aside or reversed if any one ground is found to be defective. If one or more valid grounds are found to be sufficient, such will sustain the verdict. This observation we deem to be applicable to this appeal. (See I.L.P. Trial, Sec. 316, Vol. 35.) We find no pleading deficiency that mandates a reversal as a matter of law.

It would unduly lengthen this opinion to recite the evidentiary objections made and rulings thereon; such is also true of the asserted errors as to instructions. We conclude from our examination of this record that the jury was adequately instructed and there was no error in the giving or refusing of instructions that would in any way vitiate this proceeding.

Essentially, the issues in this case boil down to credibility of witnesses as to the diverse transactions between these parties; the varying opinions as to the quality of the work performed and whether or not the work was performed in accordance with the plans and specificiations. All are jury questions. The verdict of the jury resolved the issues. That verdict is amply supported by the evidence, is not contrary to the manifest weight of the evidence, and will not be disturbed by this court on review.

As to the cross appeal, the defendant urges that the jury verdict awarding the plaintiff its entire demand except for

the $223 might have been returned under Count IV, the written contract, that such warrants a conclusion that the refusal to pay was vexatious and that interest should be allowed on the ju ment in accordance with the cited statutory provision.

The plaintiff chose to state its claim alternately in four separate and distinct counts. A general verdict was retur Such is not sufficient to establish that the jury returned its verdict for the plaintiff upon a written contract. Thus, the cross appeal is without merit. The judgment of the circuit cou of Champaign County is affirmed.

Judgment affirmed.

1 IA³ 887

Consolidated Cause No. 71-93 and No. 71-215

ABSTRACT

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. CLARENCE HELVIE, Defendant-Appellant.	Appeal from the Circuit Court of Jefferson County.

FILED

NOV 4 1971

FIFTH DISTRICT OF ILLINOIS
CLERK PRO-TEMPORE APPELLATE COURT

PER CURIAM:

Before accepting defendant's plea of guilty to a charge of burglary, on March 5, 1970, the trial court made a number of inquiries and admonishments. In response to questions put to defendant, the court was advised in a general way that defendant's attorney had advised of the possible consequences of the plea and the possible penalty. The only specific mention of the possible sentence that appears in the record, is the following:

> THE COURT: Q. You state here that you are twenty-five, and you understand, do you not, that if you are found guilty of the offence of burglary in manner and form as charged in the Indictment, that your punishment may be that you will be committed to the Department of Corrections for not less than one year and may be for an indeterminate number of years. Do you understand that?
> THE DEFENDANT: A. Yes.

This language is insufficient to advise defendant of the possible maximum sentence; by advising that the maximum is indeterminate, defendant was not, according to the record, aware of the fact that the maximum possible sentence could extend to any number of years, and from it we cannot determine that his plea was knowingly and understandingly made. Our language in the most recent case of People v. Fairchild, ____ Ill.App.2d _____, 272 N.E.2d 445, is here applicable. See also People v. Terry, 44 Ill.2d 38, 253 N.E.2d 383 and People v. Vecchio, _____ Ill.2d _____ 267 N.E.2d 27.

We therefore reverse the conviction and remand with directions that defendant be allowed to withdraw his plea and plead anew.

This direct appeal (our No. 71-93) has been consolidated with an appeal (our No. 71-215) from an order entered in a Post Conviction hearing. Our action on the direct appeal renders the appeal from the Post Conviction order, moot. Accordingly we dismiss the appeal in No. 71-215 and the same is hereby dismissed.

Reversed and remanded with directions.

PUBLISH ABSTRACT ONLY.

71-14

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 7th day of December, in the year of our Lord one thousand nine hundred and seventy, within and for the Second District of Illinois:

Present - - Honorable THOMAS J. MORAN, Presiding Justice
Honorable MEL ABRAHAMSON, Justice
Honorable GLENN K. SEIDENFELD, Justice
HOWARD K. KELLETT, Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On November 2, 1971 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

No. 71-14

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	
vs.	)	Appeal from the Circuit Court for the 19th Judicial Circuit, Lake County, Illinois.
MICHAEL T. OBERMOELLER, Defendant-Appellant.	)	

MR. JUSTICE SEIDENFELD delivered the opinion of the court:

Defendant was convicted upon his plea of guilty to an information charging him with Forgery (Ill.Rev.Stat. 1969, ch.38, par. 17-3). In accordance with plea negotiations the court sentenced the defendant to two years probation, conditioned upon his serving six months in the county jail (less time previously served). He has appealed, being represented by an attorney from the Illinois Defender Project.

Appellate counsel has petitioned for leave to withdraw from the case. He states that he has studied the entire record and has particularly considered whether the court complied with the requisites of Supreme Court Rules 401 and 402 in admonishing the defendant; has determined whether the sentence was excessive; and has also considered whether the trial court was correct in its ruling allowing the incorporation of police reports in the probation report. In accordance with the procedure set forth in Anders

v. Calif., 386 U.S. 738 (1967), the defendant has submitted the common law record and the transcript of proceedings and has filed a brief in support of his petition, stating that the direct appeal is wholly frivolous and without merit. A copy of the petition and brief was mailed to the defendant and he was permitted ample time to file any additional matters on his behalf but has not done so.

Our examination of the whole record leads us to the clear conclusion that the court was extremely careful in admonishing the defendant as to every possible right in compliance with all applicable rules and with a full understanding by the defendant. Also, from an examination of the record of the probation hearing, and noting defendant's background and prior violations, we are satisfied that the sentence, which was within the statutory limits prescribed for forgery, was not excessive and should not be reduced.

We further agree that the trial court was correct in its ruling allowing the incorporation of police reports in the probation report. The court weighed only proper matters in the consideration of the sentence, giving the defendant full opportunity to offer his explanation of the prior record. The defendant cannot claim reversible error on this record since the hearing on defendant's motion for probation is not governed by strict rules of evidence. See People v. Ackerman, 269 N.E.2d 737 (2nd Dist., 1971).

We have made a full examination of all proceedings and sustain the position of the Defender. His motion for leave to withdraw is allowed and the judgment is affirmed.

JUDGMENT AFFIRMED.

MORAN, P.J. and ABRAHAMSON, J. concur.

No. 54115

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

IN THE MATTER OF THE ESTATE OF OSCAR J. BREAULT, DECEASED, HIRSCH E. SOBLE, Petitioner-Appellee, vs. WILLIAM JOSEPH BREAULT and BONNIE JO ELLEN KATHRYN BREAULT, Respondents-Appellants.	Appeal from the Circuit Court of Cook County, Illinois, County Department, Probate Division. Honorable John E. Pavlik, Judge Presiding.

MR. PRESIDING JUSTICE EBERSPACHER delivered the opinion of the court.

This cause is yet another in the long list of litigation involving the estates of Kathryn M. Breault and Oscar J. Breault, her son. The issue before the court on this occasion involves once again the granting of interim attorney's fees. Upon this petition the sum of $49,400 was granted to the Petitioner for services rendered from February 6, 1964, to and including January 3, 1967.

The Petitioner is the attorney for Harold L. Feigenholtz who is the executor of the will of Oscar J. Breault deceased. The respondents are two of the children of Oscar J. Breault.

Although there is quite a long history of litigation (In Re Estate of Oscar J. Breault, 29 Ill.2d 165, 193 N.E.2d 824 (1963); In Re Estate of Breault, 63 Ill. App.2d 246, 211 N.E.2d 424 (1965); Breault v. Feigenholtz, 250 F.Supp.551 (1965) aff'd. 358 F.2d 39 (1966) cert. denied 385 U.S. 824, 87 Sup.Ct. 52 (1966); Breault v. Feigenholtz, 380 F.2d 90 (1967) cert. denied 389 U.S. 1014, 88 Sup. Ct. 591 (1967); People ex rel Dahm v. Corcoran, 39 Ill.2d 233, 234 N.E.2d 794 (1968); Breault v. Feigenholtz, 113 Ill.App. 2d 356, 251 N.E.2d 910 (1969);

Breault v. Feigenholtz, 128 Ill. App. 2d 1, 262 N.E. 2d 819 (1970)), a review of the circumstances which created this abundance of controversy is felt necessary.

Kathryn M. Breault died testate in August, 1952. She devised and bequeathed most of her estate to Harold L. Feigenholtz and Richard Dahm, as trustees, for her son, Oscar J. Breault, during his life with a general testamentary power of appointment. The will stating "Upon the death of my son, Oscar J. Breault, the property of the trust estate shall be distributed according to the provisions and terms of the Last Will and Testament of my son, Oscar J. Breault, and if he shall fail to execute a Will or such Will should not be admitted to probate, I hereby direct distribution of said estate in the following manner:", provisions were then made for bequests to three charities.

Richard Dahm was a long time employee of the Brolite Company, Inc., a bakery supply company. The bulk of Kathryn M. Breault's estate was all of the outstanding shares of the Brolite Company, Inc., which had been the family business. Harold L. Feigenholtz was an attorney who had drafted Kathryn M. Breault's will. Both Dahm and Feigenholtz subsequently became directors and officers of the Brolite Company, Inc.

Oscar J. Breault was married three times and had three children. His first wife was Ann and she bore him a son Kenneth in 1937, his second wife was Florence who bore him William and Bonnie born in 1944 and 1945; these two marriages ended in divorce. The third wife was Estelle to whom Oscar was married at the time of his death. Oscar died on July 16, 1959 by drowning.

On August 5, 1959, after petition by Estelle, Feigenholtz was appointed administrator to collect Oscar's estate. On October 14, 1959, Feigenholtz was appointed executor of Oscar's estate. Oscar had executed a will in 1954 subsequent to his marriage to Estelle, which was admitted to probate concurrent with Feigenholtz's appointment as executor.

Oscar's will provided in part that Feigenholtz was to be the trustee of his estate with direction that the income for life to go to Estelle then to his children until the youngest thereof reached 40 and then the corpus be divided 5% to each

child and 85% to a named charity.

Thus we have the battleground with the primary antigoinists being Feigenholtz opposed by Florence and her children, William and Bonnie. Thus far, briefly stated, the courts have determined; that the assets of Kathryn's trust were not a part of Oscar's estate and the appointment made by Oscar in his will was valid, 29 Ill. 2d 165, 193 N.E. 2d 824 (1963). That the present petitioner was entitled to partial allowance of attorney's fees in the amount of $67,630.00 for the period ending February 6, 1964 and that the fees may be paid out of non-estate appointive funds as Oscar's estate is insolvent. 63 Ill. App. 2d 246, 211 N.E. 2d 424 (1965). That neither Kathryn's nor Oscar's wills were in violation of the rule aginst perpetuities, 250 F. Supp. 551 (1965) aff'd. 358 F. 2d 39 (1966). Cert. den. 385 U. S. 824 (1966). That Oscar's probate estate consists of less than the $10,000.00 requirement to obtain Federal Court jurisdiction, 380 F. 2d 90 (1967). That mandamus would not be granted to stop a suit for accounting of Kathryn's trust filed by two of Oscar's children, (the present respondents), 39 Ill. 2d 233, 234 N.E. 2d 794 (1968). That the Limitations Act (Ill. Rev. Stats. 1967, C83, Par 24a) applies to a will contest proceeding where petitioner has been non-suited and the petitioners are entitled to a hearing on the merits. 113 Ill. App. 2d 356, 251 N.E. 2d 910 (1969). And finally that William and Bonnie obtained a valid assignment of the interest of one of the charities that were to benefit from Kathryn's trust had Oscar failed to make a valid appointment. 128 Ill. App. 2d 1, 262 N.E. 2d 819 (1970).

We are now called upon to decide; (A) if the court abused its discretion by allowing further interim attorney's fees, (B) whether prior adjudications foreclosed inquiring into a conflict of interest of the attorney for the executor in connection with this application for fees, (C) whether the finding the estate is insolvent was against the manifest weight of the evidence, and finally, (D) whether the trial court erred in admitting certain of petitioner's exhibits into evidence over objection.

The facts which surround this appeal are thus. On February 3, 1967, petitioner filed in the Circuit Court of Cook County - Probate Division a petition

"for the allowance of fees for Legal Services rendered the executor of said estate from February 6, 1964 to and including January 3, 1967". The petition was assigned initially to the judge who had made the previous allowance of fees to petitioner and to whom other matters pending in the estate were assigned. On May 24, 1968, the petition came on for hearing before this judge who heard objections of respondents and the special administrator who had previously been appointed, and ordered the hearing continued until July 22, 1968, which was the same date that a prior pending citation petition was also set for hearing. On May 29, 1968, petitioner filed a petition for change of venue from the judge which was granted.

On January 9, 1969, over objection of respondents and the special administrator for the estate, the petition for fees was heard prior to the pending citation petition.

Petitioner testified that he entered his services on time sheets which he keeps in the regular course of his business; that the entries were made at the conclusion of the day upon which the services were rendered by him in his own handwriting; that the time sheets were kept in the due and regular course of his business; that it was the due and regular course of his business to make these entries at the end of the working day upon which the services were rendered; that the entries were true and correct; that they show the services that were reasonable and necessary.

Petitioner maintained separate time sheets for the particular case in which the services were rendered; that in the Federal Declaratory Judgment suit and suit for accounting in which he successfully defeated a family settlement, he expended 497 1/2 hours; that he expended 41 hours in connection with his petition for fees in the Federal Court which was dismissed without prejudice; that he expended 294 1/2 hours of reasonable and necessary legal services in connection with the Federal will contest; that he performed services in the probate court which included the Executor's objections to the petition for citation, a brief and oral argument on the objections, but resulted in the objectors' being overruled, of 110 3/4 hours; that he defended a suit against the executor brought by Harold and William Ullrich

to recover for services in the amount of $2,017.44 with interest at 5% from November 19, 1952 wherein judgment was entered on December 14, 1964, in the amount of $2,017.73 and interest from the date of the judgment payable out of uninventoried assets and that his services were reasonable and necessary and aggregated twenty-two hours; Petitioner testified that in connection with his previous petition for fees for services to February 6, 1964, wherein it was determined that his services were worth $67,630.00 to the estate and he was allowed $45,000.00 on account that he rendered 245 hours of service on his petition and the appeal which were "reasonable and necessary"; that in applying for the balance of $22,630.00 of the $67,630.00 he rendered 25 1/4 hours of "reasonable and necessary services".

Petitioner testified that the total number of hours of legal services rendered " for the benefit of the estate of Oscar J. Breault, deceased, from February 6, 1964 to and including January 3, 1967" was 1236 hours, that he was well acquainted with the fair and reasonable and customary charges for legal services of the nature rendered, that he had tried hundreds of cases as a lawyer and handled hundreds of appeals and that the fair and reasonable value and the customary charge for the services performed were a minimum of $40.00 per hour as of the time they were rendered and that based upon such rate he claimed $49,440.00 for compensation for services rendered from February 6, 1964 to and including January 3, 1967. His time sheets were received in evidence.

Eugene A. Busch, an attorney of 30 years experience and nephew and employee of Harold L. Feigenholtz, as executor of the estate, testified that he kept the records of the trustees of the Kathryn M. Breault trust and the records of Harold L. Feigenholtz as executor of the estate of Oscar J. Breault, deceased, that as of January 1, 1969, there was in the probate estate $3,860.65 in cash and that Harold L. Feigenholtz and Richard Dahm as co-trustees claimed there was due them from Oscar's estate the sum of $142,288.34. Busch testified that he knew of nothing further in the estate. He did not explain the difference between what he testified was in the probate estate and the amended inventory. Busch recalled that there was a citation proceeding pending

in which Feigenholtz, Dahm and Busch were respondents and that the citation proceeding involved a chose in action belonging to the estate. The citation petition was received in evidence. It alleges in pertinent part as follows:

1. Petitioners are the children of Oscar J. Breault, deceased, and the grandchildren of Kathryn M. Breault, deceased, and as descendants of Oscar J. Breault and Kathryn M. Breault, are persons interested in the estates of both Oscar J. Breault and Kathryn M. Breault.

2. Under the Will of his mother, Kathryn M. Breault, Oscar J. Breault was entitled to all of the net income of her testamentary trust from the time of her death on August 3, 1952 to the time of his death of July 16, 1959.

3. Respondents represented to Oscar J. Breault that such income as he was entitled to was limited to the dividends which they in their discretion might cause to be declared as directors of the Brolite Company, Inc., a corporation wholly owned by the testamentary trust.

4. Respondents represented to Oscar J. Breault that money paid to him constituted "advances" from the corpus of the testamentary trust and that he was legally obligated to repay such sums.

5. Respondents failed to account to Oscar J. Breault for the amounts they caused themselves to be paid from the testamentary trust estate in the form of salaries, bonuses, professional fees, travel expenses, interest in profit sharing trusts and otherwise, which amounts exceeded greatly all amounts paid to Oscar J. Breault as income beneficiary of the trust.

6. Respondents arbitrarily and capriciously exercised their discretion with reference to the declaration of dividends of the Brolite Company, Inc.

7. Respondents failed to account to Oscar J. Breault for the income of the testamentary trust to which he was entitled.

8. On information and belief, petitioners allege that the income of the trust to which Oscar J. Breault was entitled exceeded One Million ($1,000,000.00) Dollars.

10. Respondent Feigenholtz has failed to comply with the order of this Court entered November 27, 1962 to file his First Report and Account as Executor.

The answer of Richard Dahm and Harold L. Feigenholtz to the citation petition was received in evidence. The citation petition is pending.

Busch admitted that he had not permitted respondents' counsel to see the trustees' records for the period prior to December 31, 1958, that the trustees commingled the income and the principal of the trust, that their records did not disclose the income of the trust-owned company, that their records did not show what Feigenholtz received from the trust-owned company in the form of salaries, bonuses, professional fees, that Busch as a lawyer representing Feigenholtz and Dahm as trustees of the Kathryn M. Breault Trust, as well as Oscar, the life beneficiary of the trust, advised Oscar relative to the operation of the trust, that the reports and accounts rendered Oscar by Feigenholtz and Dahm did not show the assets of the trust, that such reports under the term "assets" showed money that came into the hands of the trustees but do not identify the source, that under "disbursements" the reports showed payment made by the trustees but not the purpose of such payments, that the reports showed payments to persons other than Oscar, the life beneficiary under a strict spendthrift trust, that the trustees did not receive written orders from Oscar to make such payments to others, that Busch obtained Oscar's signature to statements approving Feigenholtz and Dahm's operation of the Brolite Company, because "we didn't expect Oscar's early demise but we thought we should have something where he showed his approval of what was going on with the company and about what the company was making".

Busch testified that Oscar examined the books of the company contrary to Feigenholtz's testimony in an earlier deposition at which petitioner and Busch were present, that he did not believe Oscar ever saw the books of the company.

Busch testified that Feigenholtz was a solvent, financially responsible person.

Petitioner was recalled and testified that in his opinion the estate's claim for an accounting from the inception of the trust was without merit. He testified

that Feigenholtz and Busch had been examined extensively in the Probate Court and in depositions, and in hearings before the late Judge Miner in the Federal Court, that he had interrogated his longtime friend Feigenholtz and Busch, that a CPA had examined certain records of the Brolite Company, that he had come to the conclusion first that payments to persons other than Oscar on Oscar's oral request, coupled with Oscar's approval of the three reports and accounts satisfied the spendthrift provisions of Kathryn's will, that the claim for an accounting with respect to monies paid Feigenholtz in the form of salaries from the Brolite Company was without merit because there was no proof that such salaries were excessive, that there was no proof that traveling expenses were unnecessary, that he took into consideration that the trustees paid Oscar over $20,000.00 a year, that Oscar never asked for more, and never asked for an accounting, and that according to Feigenholtz and Dahm, Oscar knew all that was going on. He testified that he relied on the presumption of good faith, that Feigenholtz had improved the position of the Company from its condition in the year after Kathryn's death, that in his opinion, the suit for an accounting brought in the Federal Court operated to estop respondents from seeking an accounting to the estate, that in his opinion the approval of Oscar on the advice of Busch, who was Feigenholtz's nephew and law associate, operated to bar the estate from an accounting, that the Statute of Limitations had run on an accounting; that his long friendship with Feigenholtz and Busch and his knowledge of their reputations caused him to rely on them somewhat more that he otherwise would; that if he felt that a citation was necessary, that he would withdraw from the case. He testified that he was actually not interested in the accuracy of the so-called fourth report and account of Feigenholtz and Dahm because there was a special administrator.

Petitioner testified that he felt that the estate's right to an accounting from Feigenholtz and Dahm was properly not inventoried because, in his opinion, the claim was without merit.

On January 10, 1969 the court entered an order finding that the petitioner was entitled to a fee of $49,440.00 for his services as set forth in his petition and

continued the cause to March 6, 1969 for a determination as to who should be ordered to pay said sum.

On March 6, 1969, the matter was continued again until March 11, 1969, and on March 11, 1969, the court entered the order from which this appeal is taken. The order, over respondents' objection, found that the Estate of Oscar J. Breault, deceased "is small, insolvent and unable to pay said fees", and ordered Richard Dahm and Harold L. Feigenholtz, as Trustees under the Last Will and Testament of Kathryn M. Breault, deceased to pay out of the assets of said trust estate to Hirsch E. Soble in 30 days the sum of $49,440 as an allowance of his fees for the legal services rendered the executor of said Estate of Oscar J. Breault, deceased, by him from February 6, 1964, to and including January 3, 1967. The order provided that on the payment of said sum, the Trustees "shall be entitled to take credit therefore in their accounts and accountings" and that there was no just reason for delaying enforcement of or appeal from the order. Notice of appeal was filed.

Initially, we consider respondents' contention that the court abused its discretion by allowing further interim fees to the petitioner. We cannot so find. The work performed by the executor's attorney at the direction of a qualified executor is without question entitled to compensation. "Moreover, this right of the executor to procure legal services and grant compensation for such is expressly recognized in Illinois by Statute. Ill.Rev.Stat. 1963, ch.3, par.337" In Re Estate of Breault, 63 Ill.App. 2d 246. The services rendered by the petitioner have been rendered. There has been no showing that the attorney's services have been performed in bad faith. There has been an allegation that the executor and the attorney have been guilty of a conflict of interest. "The executor has a right to employ counsel and under section 287 of the Probate Act, even if the letters of an executor or administrator are revolked 'all acts done by him according to law prior to the revocation of his letters are valid', Ill.Rev.Stat. 1963, ch.3, par.287" In Re Estate of Breault, 63 Ill.App. 2d 246. Thus we feel compelled to hold that petitioner's request for fees is appropriate and should have been granted. We need not therefore, decide whether

the case of In Re Estate of Breault, 63 Ill.App. 2d 246 is res judicata when the principals as enunciated therein, are otherwise controlling on the question here presented. To hold otherwise would not serve the ends of justice.

The appellants next urge that the court also abused its discretion in finding Oscar J. Breault's estate insolvent. We must again determine that the trial court did not so abuse its discretion. The trial court had as a basis for its decision the sworn testimony of the petitioner as well as another attorney familiar with the status of the estate, not to mention that the Circuit Court of Cook County - Probate Division previously so found and was upheld in the In Re Estate of Breault, 63 Ill.App. 2d 247 decision and the Federal District Court's finding of insolvency upheld in Breault v. Feigenholtz, 380 F.2d 90. Appellants urge that the Federal Court because of an "obvious misreading" of the opinion In Re Estate of Breault, 63 Ill. App. 2d 246 dismissed the will contest suit. We do not agree that the Federal Court misread the case. The Supreme Court In Re Estate of Breault, 29 Ill.2d 165 has held that the appointive property does not belong to Oscar's estate. There is not cash of consequence in the estate that is not more than offset by claims. The appellants contend that a chose in action which they assert lies against Feigenholtz and Dahm for a sum uncertain and which the appellants have been endeavoring for a decade to bring to fruition keeps the estate from being insolvent. We cannot accept the appellants' assertions. The appellants do not claim that there is a present ability to pay claims. Insolvency has been defined as that state of not having the present ability to pay debts. Chicago Title & Trust Co. v. Household Guest Co., 88 Ill.App. 126 1899, People v. Stevens, 358 Ill. 391 1935. The petitioner argues there is a present inability to pay debts. To the extent necessary that the estate need be insolvent to allow the petitioner to obtain payment from assets not of the estate, the trial court did not abuse its discretion.

Finally, we must decide if the trial court committed reversal error in admitting petitioner's exhibits into evidence over respondents' objection. The trial court

tacitly admitted that the exhibits were not admissable stating, "I don't think, really, it is admissable" we therefore can assume that the trial court did not consider this in reaching his decision. The evidence in the record is sufficient to sustain the court's findings. Prignano v. Mastro, 61 Ill.App. 2d 65.

The judgment is affirmed.

CONCUR: /S/ Charles E. Jones

CONCUR: /S/ George J. Moran

CLERK'S OFFICE
APPELLATE COURT FIRST DISTRICT
STATE OF ILLINOIS
CHICAGO CIVIC CENTER
CHICAGO, ILLINOIS 60602

LESLIE V. BECK
CLERK

Re: General No. 54115

Filed: August 27, 1971.

This office has been requested by the Court to advise you that opinion in the above captioned case has been corrected as follows:

Please substitute the enclosed page 5 (or pages) for comparative page in opinion furnished you at the time of filing.

Please make the above change on your copy of opinion. Thank you.

Very truly yours,

Leslie V. Beck

Clerk of the Appellate Court
First District, Illinois

LVB/di
Encl.

to recover for services in the amount of $2,017.44 with interest at 5% from November 19, 1952 wherein judgment was entered on December 14, 1964, in the amount of $2,017.73 and interest from the date of the judgment payable out of uninventoried assets and that his services were reasonable and necessary and aggregated twenty-two hours; Petitioner testified that in connection with his previous petition for fees for services to February 6, 1964, wherein it was determined that his services were worth $67,630.00 to the estate and he was allowed $45,000.00 on account that he rendered 245 hours of service on his petition and the appeal which were "reasonable and necessary"; that in applying for the balance of $22,630.00 of the $67,630.00 he rendered 25 1/4 hours of "reasonable and necessary services".

Petitioner testified that the total number of hours of legal services rendered " for the benefit of the estate of Oscar J. Breault, deceased, from February 6, 1964 to and including January 3, 1967" was 1236 hours, that he was well acquainted with the fair and reasonable and customary charges for legal services of the nature rendered, that he had tried hundreds of cases as a lawyer and handled hundreds of appeals and that the fair and reasonable value and the customary charge for the services performed were a minimum of $40.00 per hour as of the time they were rendered and that based upon such rate he claimed $49,440.00 for compensation for services rendered from February 6, 1964 to and including January 3, 1967. His time sheets were received in evidence.

Eugene A. Busch, an attorney of 30 years experience and nephew and employee of Harold L. Feigenholtz, as executor of the estate, testified that he kept the records of the trustees of the Kathryn M. Breault trust and the records of Harold L. Feigenholtz as executor of the estate of Oscar J. Breault, deceased, that as of January 1, 1969, there was in the probate estate $3,860.65 in cash and that Harold L. Feigenholtz and Richard Dahm as co-trustees claimed there was due them from Oscar's estate the sum of $142,288.34. Busch testified that he knew of nothing further in the estate. He did not explain the difference between what he testified was in the probate estate and the amended inventory. Busch recalled that there was a citation proceeding pending

55471

I.A. 947

HELEN JEWELL BERG,

Plaintiff-Appellee,

vs.

JACOB OSCAR BERG,

Defendant-Appellant.

APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY

HON. FRED SURIA, JUDGE PRESIDING.

MR. JUSTICE BURMAN DELIVERED THE OPINION OF THE COURT

ABST.

The defendant-appellant in this case filed his pro-se brief and excerpts of record and has otherwise complied with all statutory requirements and rules for the perfection and prosecution of this appeal. No appearance was filed by the plaintiff-appellee who was properly served with notice of the notice of appeal.

Where, after due notice, an appellee fails to appear, files no brief, and presents no argument in support of an order or judgment entered in the Circuit Court, this court may reverse the order or judgment without a consideration of the merits. C.I.T. Corporation v. Blackwell, 281 Ill. App. 504, 541 Briar Place Corporation v. Harman, 46 Ill. App. 2d 1, 196 N.E.2d 498, Ogradney v. Daley, 60 Ill. App. 2d 82, 208 N.E.2d 323, Gibralter Corporation v. Flobudd Antiques, Inc., Gen. No. 54628, 269 N.E.2d 515.

The defendant, Jacob Oscar Berg, appeals from that part of the judgment of the Circuit Court entered on November 14, 1969, in which he was found guilty of contemptuous conduct towards the court and was ordered to pay plaintiff's attorney the sum of $250.00. The aforementioned orders of the Court are hereby reversed.

REVERSED.

ADESKO, P.J. & DIERINGER, J.

CONCUR.

(Abstract only)

54326

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,
vs.
MELVIN GOLDEN (Impleaded), Defendant-Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.
HON. FRANCIS T. DELANEY, Presiding.

MR. PRESIDING JUSTICE BURKE delivered the opinion of the court:

Defendant was found guilty at a jury trial of the crime of murder and was sentenced to a term of thirty-five years to sixty years in the penitentiary. On appeal he contends that the People failed to prove beyond a reasonable doubt that he did not act in self-defense, and that the sentence imposed is excessive.

On the morning of March 15, 1968, gunfire was heard coming from the Tip Top Meat Market located at 3453 West 16th Street in Chicago. The defendant was observed running from the store, with a pistol in hand, after the shots were heard. Upon investigation, witnesses found the body of Carmen Tisbo, the proprietor of the market, lying in a corner of the store.

At the trial Miss Dorothy Brooks testified for the People that on March 15, 1968 she was employed as a practical nurse at the Lawndale Medical Center located next door to the Tip Top Market. She testified that at about 10:00 A.M. on that date she heard gunfire coming from the market, and upon investigation, she observed the defendant run out of the store carrying a pistol. The witness also observed the body of Carmen Tisbo slumped in a corner in the rear of the store, whereupon she summoned the police.

It was stipulated at trial that the defendant was the person seen running from the market; that if several named persons were called as witnesses for the People they would testify that they observed the defendant, on the date and at the time in question,

run from the market with a gun in his hand and proceed through a vacant lot; and that defendant was attired in a black headscarf, sunglasses and a coat.

Chicago Police Officer Anderson Yancey testified that he was summoned to the scene of the shooting and that he found Tisbo's body "lying in the corner of the store in a half-reclining position. It was on the east side of the building, in back of the meat cases against the back wall." Officer Ronald Pluta testified that shortly after the shooting he found a .32 caliber pistol, a black headscarf and sunglasses, rolled up in a three-quarter length coat, about a half-block from the Tip Top Market.

Detective Richard Sandberg gave a description of the physical characteristics and layout of the market, stating also that the shelves were stacked six feet high with foodstuffs. The witness testified that there was a single main aisle in the market, two shorter aisles along the sides between counters and shelves, and that there were "only two little spots to do business." The witness also stated that a total of fifteen empty pistol cartridge cases were found on the premises after the shooting, and that the .32 caliber pistol contained six empty shell cases and a .38 caliber pistol belonging to Tisbo contained six empty shell cases.

A police pathologist testified that Tisbo had been shot four times in the upper chest and shoulder, the bullets penetrating the left side of the deceased and passing to the right. A police technician testified that he examined the market for physical evidence and found .32 and .38 caliber bullets and bullet fragments at various places behind the meat counter of the market, located in the rear, left-hand corner of the store, but that he found neither bullets nor bullet fragments in any other area of the store.

Police Detectives Thomas Shine and William Lens testified that defendant made an oral statement to them after he was apprehended several days after the shooting. They testified that defendant told them that on the day before the shooting, defendant's girlfriend, Mary Smith, had complained to him that Tisbo had molested her earlier that day. They related that defendant stated that on the following morning he and a friend, David Carpenter, happened to be walking by the Tip Top Market and that defendant decided to speak to Tisbo concerning the incident. The officers further stated that defendant told them that he entered the store and questioned Tisbo about the incident, and that Tisbo denied any knowledge thereof. Defendant stated to the officers that Tisbo placed his hand in the defendant's face, that defendant slapped the hand away, and that Tisbo drew a pistol and began firing at the defendant. Defendant, who was also carrying a gun, returned the fire. He told the officers that after his gun was empty, he tried to flee from the store, but that Tisbo attempted to grab him from the rear. Defendant told the officers that he pushed Tisbo aside, and that he ran to a nearby vacant lot where he discarded the gun, the headscarf and the coat he was wearing.

Douglas Gaffney testified for the defense that he was employed at the medical center next door to the Tip Top Market, and that immediately prior to the shooting he heard arguing and loud talking coming from the market.

Defendant testified in his own behalf and stated that March 13, 1968 was his nineteenth birthday and that while attending a small party his girlfriend arrived home and informed him that Tisbo had molested her earlier that day. On March 15, 1968 defendant and David Carpenter were walking near the Tip Top Market, and defendant decided to enter the market and question Tisbo why he had molested the girlfriend. Defendant testified that Tisbo stated to him,

"What the hell do you doing coming in here asking me about her," (sic) and pushed a finger into defendant's face. The defendant testified that he replied by striking Tisbo under the arm, at which point Tisbo drew a pistol and commenced firing at defendant.

Defendant testified that as Tisbo fired at him, defendant took cover in front of a counter. He stated that he and Tisbo were on the opposite sides of the meat counter and that he could see Tisbo moving to the right. The defendant testified that he then began firing at Tisbo and that Tisbo started to move to his left, remaining behind the counter. Defendant testified that he attempted to escape through the front door of the market, but that Tisbo had circled to the front and attempted to block his departure. The defendant stated that he pushed Tisbo aside, ran out the front door of the market, went through a vacant lot, and discarded his sunglasses, gun, coat and headscarf. He denied rolling the discarded items into a bundle.

On cross-examination defendant testified that he carried the gun which he had on his person when he entered the Tip Top Market because of the type of neighborhood he lived in. He also stated that during the exchange of gunfire in the store he fired at Tisbo as the latter passed between an opening between the counters, and that Tisbo was facing the front of the store in a crouched position. Defendant denied telling the police that Tisbo attempted to stop his departure from the store, and further denied he had planned to confront Tisbo prior to the time he was passing the store on the morning in question.

David Carpenter testified for the defense that at about 6:00 P.M. on March 13, 1968 he observed defendant and Mary Smith together at defendant's mother's home, and that Mary Smith was crying. He testified that on the morning of March 15, 1968 he and the defendant

happened to pass by the Tip Top Market, and that the defendant remarked that he wished to go inside and speak to Tisbo about Mary Smith. The defendant approached Tisbo, who was standing behind a counter or a freezer, and questioned him about the alleged Mary Smith incident. Tisbo stated that he knew nothing about the girl and shook his hand in defendant's face. Defendant thereupon pushed Tisbo's hand away, and Tisbo fell back, drew a pistol and began firing. The witness stated that he immediately fled through the rear entrance of the store. On cross-examination Carpenter testified that defendant, Mary Smith and the witness spent the entire night before the shooting at defendant's mother's house.

Mary Smith testified that she encountered Tisbo on March 14, 1968, and that she told the defendant of the incident about 1:00 P.M. that same day. On cross-examination she testified that she and the defendant spent the entire night prior to the shooting at the house of a friend named "Lean."

In rebuttal Detective Sandberg testified that on March 24, 1968 he took a signed statement from David Carpenter, wherein Carpenter stated that he had spent the night before the shooting at his girlfriend's house. The statement also recited that early on the morning of the shooting, he met the defendant and that defendant told him that Tisbo had "been playing around with Mary and...he asked if I would go with him.... I knew that Melvin was going to give the man some rough words." At trial Carpenter testified that he commented to Officer Sandberg that he knew defendant was going to "give Tisbo rough words" at the time they first entered the Tip Top Market.

The defendant contends that the People's evidence fails to prove that he was not acting in self-defense when he shot Tisbo. We disagree.

The evidence adduced by the People, that the body of Carmen Tisbo was found slumped in a corner in the rear of the market, the body having been penetrated by four bullets from defendant's pistol, belies defendant's contention that Tisbo's alleged presence in the front portion of the store blocked defendant's only means of escape, forcing him to shoot Tisbo. There also was evidence that some fifteen empty cartridge cases were found at the scene of the shooting, but that all of the bullets and bullet fragments located at the scene were found only in the area where Tisbo's body was located, near the rear of the store. It is highly improbable that a person who had been shot four times in the upper portion of the body would choose to move from the front of the store, where defendant claims Tisbo was as defendant attempted to escape, to the rear of the store where he died.

Further militating against defendant's claim of self-defense is his flight from the scene after the shooting, especially in light of his testimony that he heard Tisbo's gun "clicking" as he attempted to fire at defendant, as if the weapon were out of ammunition. The fact that defendant discarded the clothing, the gun and the glasses during the flight further discredits his claim of self-defense. People v. Rossini, 25 Ill.2d 617. Although there was evidence that defendant knew on the day of the shooting that Tisbo had died, he made no attempt to surrender to the authorities.

The People's evidence reveals that the defendant entered the Tip Top Market armed with a fully loaded gun, and admittedly for the purpose of confronting Tisbo. Tisbo further made no attempt, under defendant's own theory of the case, to draw his weapon until after he was struck by the defendant; and the defendant made no attempt to flee until after he had emptied his weapon at Tisbo, although he had the opportunity to flee when Tisbo began circling behind the meat counter. There was sufficient evidence adduced at

trial incompatible with a theory of self-defense, and from which the trier of fact would have found that the defendant was not acting in self-defense when he shot the deceased. People v. Adams, 113 Ill.App. 2d 205.

We are in agreement with defendant's contention that the sentence imposed is excessive. At the time the instant crime was committed, defendant was nineteen years of age and had a prior criminal record consisting solely of a misdemeanor conviction. A minimum sentence of thirty-five years in the penitentiary under these circumstances could likely defeat the effectiveness of the parole system by making mandatory the incarceration of the defendant long after effective rehabilitation has been accomplished. People v. Lillie, 79 Ill.App.2d 174, 179. The sentence is accordingly reduced to a term of twenty years to sixty years in the penitentiary. Supreme Court Rule 615; Ill.Rev.Stat. 1969, ch. 110A,par.615.

For these reasons that part of the judgment sentencing defendant is modified to a term of not less than twenty years nor more than sixty years in the penitentiary, and as modified, the judgment is affirmed.

JUDGMENT AFFIRMED AS MODIFIED.

LYONS and GOLDBERG, JJ., concur.

54426

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ROBERT J. KOSILEK, (IMPLEADED) Defendant-Appellant.	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. Hon. Reginald J. Holzer, Presiding.

MR. JUSTICE GOLDBERG delivered the opinion of the court:

Upon a hearing on revocation of probation, Robert J. Kosilek (defendant), was sentenced to the penitentiary for a term of two to five years. By this appeal, he raises one issue; namely, that the trial court actually sentenced him for the violations which caused revocation of probation and not for the original offense.

The facts may be readily stated. Defendant was indicted for possession of a narcotic drug, marijuana. Ill.Rev.Stats. 1967, ch.38,par.22-3. He pleaded guilty and the cause was heard by stipulation. Defendant had possession of a marijuana cigarette, a small quantity of cannabis, two hypodermic needles and nine plastic packets of amphetamine powder. At that time, defendant was 19 years old. He had never been previously convicted of any crime; felony or misdemeanor. On November 12, 1968, upon the plea and finding of guilty, the court sentenced defendant to a term of five years probation. The court required him to submit to narcotic testing during the period of probation. Ill.Rev.Stats. 1969, ch.38,par.22-41.

Some six or seven months later, on June 4, 1969, defendant appeared before the court again. This was a hearing on revocation of probation. Charges were made that defendant had failed completely to report to the probation authorities; that he had

left Illinois without permission and had gone to live in Los Angeles. There he was charged with the theft of an eyebrow pencil from a drug store. He pleaded guilty and the California court placed him under supervision for one year.

At the revocation hearing, defendant by his counsel admitted the factual basis of probation violation but requested leniency. He stated that he had gone to California only to leave his old environment and that it had never occurred to him that he should advise the probation officer of this. Defendant also stated to the court that he would be satisfied to enter the Armed Forces at that time. The court was informed that he had previously received a notice of induction which he had disregarded.

The court found that defendant had violated the conditions of his probation. Defendant was sentenced to the penitentiary for a term of two to five years. Ill.Rev.Stats. 1969, ch.38, par.117-3(d). The penalty then prescribed by law for possession of narcotic drugs, first offense, remained as it was when defendant originally pleaded guilty: a fine of $5000 and imprisonment in the penitentiary for a minimum period of two years with maximum of ten years. Ill.Rev.Stats. 1969, ch.38,par.22-40.

During the proceedings for revocation of probation on June 4, 1969, the trial court told defendant, "You're not going to take advantage of this court twice." The court also stated to defendant during this hearing, "You've violated the law three times***." Defendant's counsel urges strongly that these statements indicate that defendant was actually not sentenced solely for his original offense but that the sentence was imposed because of the subsequent violations which resulted in the hearing on revocation of probation.

It is firmly established in this jurisdiction that any sentence imposed as a result of revocation of probation should relate exclusively to the crime for which defendant was originally sentenced and the court should not impose sentence at the revocation hearing for any crime committed after defendant was admitted to probation. People v. Turner, 129 Ill.App.2d 24, 26; People v. Livingston, 117 Ill.App.2d 189, 191-92; People v. Smith, 105 Ill.App.2d 14, 17. However, we cannot agree with defendant's argument that this principle is applicable here.

The two statements by the trial court are taken from context. After reading the record, we are not convinced that the sentence was imposed as a result of subsequent violations of the probation originally imposed. In the absence of more substantial circumstances to demonstrate the validity of defendant's argument, we are compelled to classify it as "mere conjecture." See People v. Smith, 105 Ill.App.2d 14, 20. The simple fact that the trial court imposed the minimum jail sentence then permitted by law upon the plea and judgment of guilt serves as final refutation of defendant's argument. From this point of view, the judgment should be affirmed.

Defendant's counsel also urges us informally but sincerely to exercise our power to reduce the sentence. 43 Ill.2d R.615 (b)(4). That power is not applicable in this case. The minimum sentence imposed by the court of two years in the penitentiary was the minimum jail term available to the court under the narcotic statute as it then existed. As defendant conceded at the hearing, he had violated his probation. We are cognizant of defendant's youth and of the fact that he is a first offender. People v. Miller, 266 N.E.2d 427. However, neither the trial court nor this court is in position to modify or avoid the statutory mandate. Defendant cannot benefit

from legislative amelioration of penalty effective after sentence has been entered. See Ill.Rev.Stats. 1969, ch.131,par.4; People v. Hansen, 28 Ill.2d 322, 341 and People v. Carleton, 116 Ill.App.2d 450, 453, 454. Therefore, the judgment and sentence appealed from are affirmed.

Judgment affirmed.

BURKE, P. J. and LYONS, J. concur.

71-29

I I.A. 3 1002

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

ABST.

At a session of the Appellate Court, begun and held at Elgin, on the 7th day of December, in the year of our Lord one thousand nine hundred and seventy, within and for the Second District of Illinois:

Present - - Honorable THOMAS J. MORAN, Presiding Justice
Honorable MEL ABRAHAMSON, Justice
Honorable GLENN K. SEIDENFELD, Justice
HOWARD K. KELLETT, Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On October 13, 1971 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

No. 71-29

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

PETER J. STURA and ELEANOR L. STURA, formerly known as ELEANOR L. LUKOSIUS, Plaintiffs and Counter-Defendants-Appellees, vs. ROBERT KRILICH, Defendant and Counter-Plaintiff-Appellant.	Appeal from the Circuit Court for the 18th Judicial Circuit, DuPage County, Illinois.

MR. JUSTICE SEIDENFELD delivered the opinion of the court:

Peter J. Stura and Eleanor L. Stura, his wife, filed a verified complaint to quiet title to certain real estate; to expunge from the record a certain contract for the sale of the real estate between plaintiffs as sellers, and defendant, Robert R. Krilich as buyer; and for damages from the defendant for the unlawful recording of the contract.

The defendant filed a counter-claim for specific performance of the recorded contract.

The trial court held that the contract had never been accepted by Krilich and that there was a lack of mutuality of enforceability of the contract. The court quieted title to the property in plaintiffs; denied damages to plaintiffs; and denied the counter-claim for specific performance.

In this appeal, defendant first argues that the finding of the trial court that no contract existed between the plaintiffs and the defendant is palpably against the manifest weight of the evidence. Defendant also urges that the trial court erroneously held that there was no mutuality of remedy; and improperly based its decision on the defense of laches, although that defense was not pleaded.

Some time prior to June 20, 1966, Krilich signed a real estate contract, prepared on a commonly used printed form, for the purchase of the subject real estate for $36,000. Defendant gave the signed contract and the 10% earnest money provided for in the contract to one Sceresse, the broker in the transaction, who then delivered the writing and the earnest money to one Price, the attorney for the Sturas.

After receipt of the contract, Price, in the presence of the Sturas, inserted an additional clause making the writing also subject

> "to easement as shown on Plat of Lukosius' Second Plat of Survey, recorded on August 18, 1953 as document 692273 and drainage ditches, other easements, feeders and laterals, if any."

After the addition of this clause to the contract, plaintiffs signed it. Price thereupon deposited the earnest money in his trust account and returned the contract with the added clause to Sceresse. Sceresse returned the contract to Krilich who, on June 27, 1966, wrote to Sceresse stating,

> "Please be advised that I am not accepting the contract as altered unless I first see a plat of survey xxx. After I review the survey I will accept it or reject it at that time."

On July 29, 1966, Krilich also wrote to Price requesting the plat of survey and included the statement,

> "xxx so we can make the necessary decision as to your ability to convey the land as per the terms of your contract."

The preliminary report of title was sent to defendant on July

27, 1966 (and a survey of the property sent on July 29th). Objections on the preliminary report included a 50 foot easement on the west side of the property; and an additional 30 foot easement on the east side of the property, 15 feet of which included the east 15 feet of the subject property. The sale was made subject in the contract to both easements by the added provision. After July 29, 1966, discussions were held by defendant and Price at Price's office and also over the telephone regarding the removal of the 15 foot easement on the east. On September 28th, 1966, Price wrote to defendant and informed him that it was impossible for him to remove the 15 foot easement and inquired whether Krilich wanted to close the transaction or terminate the contract. Price testified that the main thrust of Krilich's objections up to this time was as to the easement along the east side of the property. Referring to the period between July 29, 1966 and September 28, 1966, Price stated that he did not recall that Krilich specifically used the words that he rejected the contract because of the easement, but that he did recall that Krilich said,

> "You added to the contract after I signed it without my authority."

Price also stated that Krilich did not accept the easement and said "you have to give me title without this easement in it."

Krilich testified that he did not object to the 50 foot easement after talking to Sceresse, but he felt the 15 foot easement was not in the contract and that it was the seller's obligation to remove it. Krilich further testified that he was willing to perform as soon as the objection of the 15 foot easement was waived, but that he also stated to Price that he would prefer to buy the property in accordance with the contract.

After receiving the letter of September 28th, Krilich asserted that the objection could be cured and testified he stated that he

was willing to go through with the contract but according to its terms. On October 10, 1966, Krilich recorded the contract in DuPage County, Illinois.

On March 28th, 1967, Price again wrote to Krilich stating that the Sturas were unable to cure the defect in the title report and were willing to convey the title subject to the objections. Krilich responded in a letter dated April 5th, 1967, that the objection could be cured and that it was Stura's responsibility to have it waived even if it necessitated litigation.

Then, on May 9th, 1967, plaintiffs executed a Declaration of Forfeiture referring to the terms of the sales agreement and stating that the defect of the 15 foot easement was not cured by the Sturas within the time prescribed; that they had given written notice of their inability to cure the defect and that the buyer had thereafter failed to give the seller notice of his election to take the title as it existed. The Declaration of Foreiture was sent to Krilich along with the earnest money on May 17th, 1967. It was recorded on May 19th, 1967 in DuPage County. Krilich retained the earnest money until October 20th, 1967, at which time he returned it to Price.

Following the recording of the Declaration of Forfeiture, Price was in touch by phone and letter with both Krilich and a White, Krilich's then attorney. White wrote Price about curing the objection and removing the easement. Price informed White he had terminated appellant's interest by the Declaration of Forfeiture. Subsequently, the Sturas were contacted by Price, at Krilich's suggestion, about a reduction in price which they refused. Price informed Krilich of the refusal and intimated the Declaration of Forfeiture was not final.

White then told Price in mid-July, that Krilich would close the deal at no reduction in price if it could be done on Septem-

ber 1, 1967. Price, without consulting the Sturas who were away, told White this was acceptable. The Sturas did not learn of the new offer until mid-August when they received a second inquiry from Price asking for instructions, the first having gone unanswered.

Price testified that at a conference in his office on August 30, 1967 the plaintiffs authorized him to go ahead with the close of the sale. The plaintiffs testified that after May 19, 1967 they never directed anyone to close the transaction.

In September of 1967 the Sturas requested Price to forward his file on the matter to another attorney.

Krilich contends that the evidence clearly shows acceptance of the counter-offer. He points to the language used in correspondence from Price to Krilich, "your contract to purchase" and, "the property you are purchasing"; the testimony of Krilich as to his acceptance of the contract during the summer of 1966; Price's attempt to remove the easement; and Krilich's lack of demand for return of the earnest money, to support his argument. He also places reliance upon Price's testimony of his authorization on August 30, 1967 to close the sale. Krilich also emphasizes that plaintiff's Declaration of Forfeiture under oath stated that plaintiff "entered into a written contract" and otherwise referred to a "contract".

In our view, the judgment below was not against the manifest weight of the evidence. The record supports the conclusion that no binding contract was ever entered into between the parties. The form of contract dated June 20, 1966, and signed by Krilich was not accepted in its exact terms by the Sturas. In order for there to be a valid acceptance of an offer, constituting a contract, the acceptance must conform exactly to the offer. Whitelaw v. Brady, 3 Ill. 2d 583, 589 (1954). The additional clause inserted by Price for the Sturas was a rejection of the offer to purchase by Krilich and

constituted a counter-offer. Snow v. Schulman, 352 Ill. 63 (1933). Despite the terminology thereafter used ("contract", "entered into" and"purchasing") in context,reference is to the counter-offer and negotiations which did not result in an agreement.

Defendant has also argued that the trial judge erroneously assumed that personal or direct acceptance of the contract as changed by the defendant was required. We agree that where no mode of acceptance is set forth in an offer, the acceptance need not be in any particular form nor evidenced by express words and may be signified by acts and conduct of the party which clearly constitute acceptance of the agreement. Calo, Inc. v. AMF Pinspotters, Inc., 31 Ill. App. 2d 2, 11-14 (1961). We do not perceive an erroneous application of the rule by the court, but rather a finding that under all the circumstances there was no meeting of the minds between the plaintiff and defendant.

The trial court also properly found that there were no acts or conduct after the Declaration of Forfeiture which would create a meeting of the minds which would result in a binding contract. Defendants have argued that plaintiffs after filing the Declaration of Forfeiture, authorized their attorney Price to consummate the sale at a conference held on August 30, 1967.

Implicit in the trial court's finding that there was no acceptance of the counter-offer of the Sturas is the conclusion that the counter-offer was effectively terminated by the Declaration of Forfeiture. Discussions following this were merely negotiations with no meeting of the minds of the parties. Krilich's offer to close the deal did not constitute an acceptance by Krilich. The conflicting evidence of Price's alleged authorization at the August 30, 1967, conference was for the trial court to weigh.

Without such authorization, Price could not abrogate the effect of the Declaration of Forfeiture or accept the offer of Krilich to close the transaction on September 1, 1967, and thereby bind the Sturas by his actions. An attorney cannot act as agent for a client he has

been retained to advise unless specially authorized to so act. Lanski v. Chicago Title & Trust Co., 324 Ill. 367, 373 (1927).

Defendant has also argued that plaintiffs have made judicial admissions in pleadings which should conclusively influence our determination of the manifest weight of the evidence issue. In the main, the allegations of the verified complaint, taken in context, do not admit or acknowledge that a valid agreement existed between the parties. The reference to "contract" is used to denote the writing signed by Krilich in the offer form and as changed by the Sturas before they signed, and is not a conclusive admission that a valid contract existed. However, in a counter-claim defendant had alleged that "on June 20, 1966, counter-plaintiff and counter-defendant entered into a contract for the sale of real estate xxx". Defendant has placed particular reliance on the general admission of that paragraph in plaintiff's verified answer to the counter-claim, although in an amended answer to the counter-claim plaintiffs denied the same allegations. We are not persuaded by defendant's argument that the admission relied upon must be considered incontrovertible under the authority of Rosbottom v. Hensley, 61 Ill. App. 2d 198, 215 (1965) cited by defendant. Rosbottom notes the distinction between judicial admissions, which may include those made in pleadings and be incontrovertible, and evidential admissions, which are not conclusive. Here, the general admission in the pleading that the parties "entered into a contract" was withdrawn and superseded by the later pleading denying that fact. While the withdrawn pleading was available as an evidentiary admission, it was not a judicial admission and was not considered by the parties as a substitute for trial evidence. See Precision Extrusions, Inc. v. Stewart, 36 Ill. App. 2d 30, 50 (1962); People ex rel. Nelson v. Central Mfg. Dist. Bank, 306 Ill. App. 15, 30 (1940).

The evidence at the trial, including the evidential admission, was sufficient to show that at no time was there a meeting of the

minds between plaintiff and defendant. The trial court's finding that defendant did not accept the counter offer of the plaintiff is not against the manifest weight of the evidence.

In upholding the finding of the trial court that there was no valid contract entered into by the parties we do not reach the question of whether the court properly found that there was no mutuality of remedy; nor do we reach the claim that the defense of laches was not in the pleadings and it was error for the trial court to weigh it in its decision.

The judgment of the trial court is affirmed.

AFFIRMED.

Presiding Justice Moran and Justice Abrahamson - concur.

70-238

UNITED STATES OF AMERICA

21 I.A.3 1040

State of Illinois)
Appellate Court) ss:
Second District)

ABST.

At a session of the Appellate Court, begun and held at Elgin, on the 7th day of December, in the year of our Lord one thousand nine hundred and seventy, within and for the Second District of Illinois:

Present - - Honorable THOMAS J. MORAN, Presiding Justice
Honorable MEL ABRAHAMSON, Justice
Honorable GLENN K. SEIDENFELD, Justice
HOWARD K. KELLETT, Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On November 2, 1971 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

No. 70-238

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

Abstract

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
v.
JOSE FRANCISCO ESTRADA,
Defendant-Appellant.

Appeal from the Circuit Court of Boone County, Illinois.

MR. JUSTICE SEIDENFELD delivered the opinion of the court:

The defendant, Jose Francisco Estrada, was indicted on three counts, including Murder, Voluntary Manslaughter, and Involuntary Manslaughter. After a jury trial he was convicted of Voluntary Manslaughter and sentenced to three to twelve years in the penitentiary.

Upon appeal defendant argues that the court erred in denying his motion to suppress oral statements; that he was not proven guilty beyond a reasonable doubt; that the court erred in denying him probation; and that the sentence is excessive.

From our review of the testimony presented at the preliminary hearing upon defendant's motion to suppress certain exculpatory oral statements made by him when he was arrested, we conclude that defendant was adequately informed of his constitutional rights and made an understanding waiver. Two police officers, Deputy Rand and Deputy Rollins and the State's Attorney, John Maville, testified at this hearing. With minor variations their testimony was

that they entered the room (in a rooming house) where defendant was sleeping; that Maville advised defendant that he didn't have to say anything, that what he said could be used against him, that he had a right to an attorney and for the attorney to be present at any questioning and that if he could not afford an attorney one would be appointed. Rand and Maville testified that Estrada said nothing, but only gave them a blank stare and because of this Maville immediately advised defendant of the same rights again and that Estrada then said he understood. (Deputy Rollins testified that Estrada was not advised the second time at the house.) Defendant was asked three questions; where he had been that evening, whom he was with, and how did he return home. In his answer to these questions defendant denied being at the scene of the crime. The police then searched the room, found boots covered with dust and he was asked about them. Defendant admitted that they were his boots then gave an exculpatory statement regarding the origin of the dust. Defendant was taken to the Sheriff's Office and again advised of the same rights as previously stated; and in addition he was shown a card in which the warnings were written and he was given an opportunity to read the card. Defendant was then asked the same four questions which had been asked at the house and answered as he did before. He was then asked five more questions involving his knowledge of other persons known by the police to have been present at the scene of the homicide. When the defendant said he did not want to sign a written statement, that he "didn't think he ought to", the conversation was terminated.

The defendant concedes that the form of the warnings complied with Miranda v. Arizona, 384 U.S. 436 (1966) but he argues that a mere formal recitation and an affirmative response to a question of his understanding of these rights after all of them have been

read to him is insufficient without further inquiry into the subject's understanding as to each of the rights.

The controlling issue is whether defendant was adequately advised of his rights, not whether the precise language suggested in Miranda is used, but there is no basis for requiring that a defendant reaffirm his understanding after each of the warnings is given. See Miranda v. Arizona, supra, 384 U.S. 436 at 444; The People v. Hill, 39 Ill.2d 125, 132 (1968); People v. Smith, 108 Ill.App.2d 172, 177-178 (1969). The response of this defendant was a sufficient acknowledgment of his understanding of his rights. See The People v. Hill, supra, 39 Ill. 2d 125 at 133; People v. Long, 119 Ill.App.2d 75, 82 (1970).

Defendant also argues that his refusal to sign a written statement should be treated as a disclaimer to the same extent as if made at the outset of the questioning. We find no authority for this position. The refusal to make a written statement here demonstrates an awareness of defendant's rights, a lack of over-bearing by the police, and in fact, infers a knowing and intelligent previous waiver of his rights. People v. Johnson, 122 Ill.App.2d 148, 156 (1969).

Defendant testified at the trial and admitted the knifing of the deceased Russell Harnish. He argues that the state failed to prove beyond a reasonable doubt that his belief that such force was necessary to prevent imminent death or great bodily harm to himself or another was unreasonable. (Ill.Rev.Stat. 1969, ch.38, pars. 7-1, 7-4 and 3-2(b)).

There is no doubt - and the state concedes - that Harnish was the aggressor in the incident. As defendant, together with Ronald Briggs, Millie Blodgett and Mary Lou Laurent, were leaving a tavern Harnish was violently objecting that Millie was his wife (in fact Millie was not married to him but had lived with him for a time). Harnish followed the four in his car. There was a high speed,

bumper-to-bumper chase through the town and into the country. At one point Harnish's car passed the car Briggs was driving, turned around and came directly at the car. Harnish was obviously drunk. Briggs was prevailed upon by the girls to stop his car. Harnish pulled alongside, swearing and yelling at Millie. He then moved his car in front of Briggs' car and got out. He was described as "real wildand mad", and "in a rage". Both Briggs and Estrada tried to calm Harnish and asked Millie if she wanted to go with him. She refused. Estrada told Harnish he did not want any trouble. Harnish struck Estrada and knocked him to the gravel. They fought. Briggs broke up the fight. Briggs asked Harnish to settle the matter at the police station. Harnish threatened Briggs repeatedly that he was going to kill him. He then hit Briggs and fought him. Harnish was on top of Briggs and was choking him. Briggs was unable to move. Estrada testified that Rodney Briggs was yelling and that he heard something about a "gun", and "killing". Estrada testified that he pulled a knife out of his pocket and stabbed Harnish in the side once, and possibly a second time; that Harnish hit him and defendant fell on the ground; that he stabbed Harnish again as Harnish came after him but did not know if he did this more than once. The other witnesses testified similarly to the occurrence except that they did not see the actual stabbing.

Briggs and Estrada got back into the car. Harnish jumped on the hood, beat on it and was yelling at the occupants. He tried to get into the car from Millie's side and was still standing at the side when Briggs drove away. The occupants of the Briggs car thought they saw lights following them. There was testimony that Estrada told Briggs that Harnish was cut on the arm and not badly; but also testimony that Estrada whispered to Mary Lou that he thought he killed Harnish. On the way Estrada threw away the knife.

They then drove back to the scene and saw that Harnish's car had been moved from where it had been when they left but there was no one in it. One of the girls testified that Estrada wanted to get out to see what she thought was "something white in the ditch". There were objections by the others and they did not get out. There was testimony that Estrada had told the others that nothing should be said about the incident. Briggs drove the girls back to the car of one of them and shortly thereafter the girls reported the incident to the police.

There was further evidence, somewhat in conflict, of Harnish's bad reputation as a peaceful and law abiding citizen and as to his propensity to start fights when drinking. There was evidence that Briggs was "a slight" 5'3"; that Harnish was about 5'10" and weighed 170-180 pounds; and that Estrada was 5'7" and weighed 120 pounds.

The pathologist testified to ten wounds in the body of deceased. In his opinion most were superficial but three were significant: two wounds close together in the upper back and a wound in the right front in the mid part of the chest, which he considered to be the fatal one.

The state argues that under these facts, the jury could legally conclude that, although Harnish was the initial agressor, the killing was not justified. We agree that there was sufficient evidence for the jury to reach a verdict of Voluntary Manslaughter. The jury could properly weigh the defendant's testimony regarding the justification for his actions. No one other than the defendant testified that there was any real fear that Harnish would kill anybody. Estrada and Briggs fought a man, concedely intoxicated (.166 per cent blood alcohol was found in the deceased's blood stream by the pathologist); and neither suffered serious injuries. Estrada stabbed Harnish ten times in all. On the record we cannot

say the verdict of the jury is palpably contrary to the weight of the evidence or so unsatisfactory as to justify a reasonable doubt of defendant's guilt. There was sufficient evidence to prove beyond a reasonable doubt that the defendant was unreasonable in his belief that deadly force was necessary to prevent imminent death or great bodily harm to the defendant or Briggs. Thus we may not set aside the jury's determination on the conflicting facts. The People v. Wilson, 45 Ill.2d 581, 586 (1970); The People v. Crews, 38 Ill.2d 331, 335 (1967); The People v. Knox, 116 Ill.App.2d 427, 436, 437 (1969).

There is also no merit in defendant's argument that the denial of probation to defendant after full hearing was an abuse of discretion. See The People v. Pelikan, 6 Ill.2d 275, 277 (1955).

However, we find merit in defendant's argument that his sentence should be reduced in the exercise of our powers under Ill.Rev.Stat. 1969, ch.110A, par. 615(b)(4). The defendant was twenty-three years old at the time of trial. His previous involvement with the law consisted of convictions for driving without a license. He was employed when arrested, having held the same job for more than 23 months. He had a good reputation among his co-workers for being law abiding and truthful. He had been schooled in Mexico and had gone to the fifth grade. He had no education in the United States, but had learned English from listening to others. While in the county jail for a period of seven months awaiting trial, he exhibited no bitterness and maintained a constructive attitude. So much so, it was noticed by the jail authorities and others in the community. With their help, the defendant developed artistic skills, painted more than 50 pictures and constructed numerous saleable art products. He acted as jail barber and a court interpreter for Spanish speaking people.

While we cannot interfere with the conclusion of the jury that the defendant used more force than was reasonable or was in greater fear of bodily harm than, objectively, he should have been, we think that the defendant has shown more than ordinary rehabilitation potential and that the entire circumstances warrant our exercise of the power to reduce sentences.

Therefore, the sentence of 3-12 years in the penitentiary imposed by the trial court is reduced to 2-6 years in the penitentiary. See People v. Owens, 73 Ill.App.2d 108, 115 (1966). As so modified, the judgment is affirmed.

AFFIRMED AND SENTENCE MODIFIED.

MORAN, P.J. and ABRAHAMSON, J. concur.

54537

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	APPEAL FROM
vs.	)	CIRCUIT COURT, COOK COUNTY.
EZELL SAWYER, Defendant-Appellant.	)	HON. L. SHELDON BROWN, Presiding.

MR. PRESIDING JUSTICE BURKE delivered the opinion of the court:

An indictment was returned against defendant charging him with two counts of armed robbery. On March 1, 1969 defendant entered a plea to the indictment of guilty of the crime of "plain robbery" and was found guilty by the court of "plain robbery." Defendant was placed on probation for a period of "three (3) years, condition of probation be that the first seven (7) months of probation be served in the Cook County Jail (sic)...."

On June 11, 1969 the Probation Department filed an application with the trial court for the issuance of a warrant for the violation by defendant of the terms of his probation. On July 2, 1969 the court issued a rule to show cause why defendant's probation should not be terminated, on the ground that defendant was found guilty of an armed robbery perpetrated on March 8, 1969, one week after he was placed on probation in the instant cause, and for which he was sentenced to a term of two years to four years in the penitentiary by Judge Daniel J. Ryan.

The Public Defender of Cook County was appointed counsel for the defendant, and the hearing on the rule to show cause was set for July 16, 1969, on which date, it appears from the record, the hearing on the rule was continued to August 1, 1969 on motion of defendant for the purpose of allowing him time to secure counsel of his own choosing.

The hearing on the rule to show cause was held on August 1, 1969. At the outset of the hearing defendant's probation officer reminded the court that the matter had been continued to that date because the defendant wished to secure private counsel. The court replied, "Hasn't been able to do it, is that it?" and the assistant public defender assigned as defendant's counsel stated to the court that the Public Defender's Office was then still involved as defendant's counsel.

Evidence was presented to the court relating to the commission by defendant of the March 8, 1969 robbery and defendant took no exceptions to the allegations, other than to the representation as to the length of the term of probation originally set by the court. Defendant's probation was thereupon revoked. After hearing evidence in aggravation and mitigation the trial court sentenced defendant to a term of two years to four years in the penitentiary, the sentence to run consecutive to and commence after the expiration of the sentence imposed upon defendant by Judge Ryan for the March 8, 1969 robbery.

Defendant appeals, contending that he was denied the right to counsel of his own choosing at the hearing on the rule to show cause and further that the court erred in considering certain improper evidence offered at the hearing in aggravation and mitigation in arriving at the sentence imposed.

On July 2, 1969 a rule was issued to show cause why defendant's probation should not be revoked, and hearing on that rule was set for July 16, 1969. However, on July 16th, on motion of the defendant, the hearing was continued to August 1, 1969 for the purpose of affording defendant an opportunity to secure counsel of his own choosing. On August 1, 1969, defendant appeared for the hearing without privately retained counsel; and, when the court was reminded of defendant's earlier desire to secure private counsel, the court commented that the defendant

had been unsuccessful in securing counsel. The assistant public defender then informed the court that the Public Defender's Office still represented the defendant. During that entire colloquy defendant stood mute and requested no additional time in which to secure private counsel. Under the circumstances defendant had been allowed a reasonable time and opportunity to secure private counsel, and the trial court properly proceeded with the hearing on the rule to show cause. See People v. Solomon, 24 Ill.2d 586; People v. Boston, 89 Ill.App.2d 49.

The case of People v. Green, 42 Ill.2d 555 cited by defendant is not in point. In the Green case defendant requested a continuance for the purpose of having privately retained counsel assist in his defense. The trial court in Green was advised that defendant's counsel was engaged in a case in another state and that defendant's church had assisted him in obtaining counsel. The court on review held that it was error for the trial court to have proceeded with the case without attempting to verify the defendant's representations. Circumstances of such nature do not exist in the case at bar.

Defendant's second contention is that the trial court improperly considered incompetent evidence in arriving at the sentence imposed upon him. He argues that the court considered two arrests of the defendant which did not result in convictions and also failed to consider sufficient evidence in mitigation of the crime. Defendant further argues that because the trial court ordered that the instant sentence run consecutive to the sentence imposed on the March 8, 1969 robbery conviction, thereby in effect imposing a possible sentence upon defendant for a term of from six to eight years, emphasizes the point that the court considered the improper evidence in arriving at the sentence imposed. We disagree.

At the hearing in aggravation and mitigation the court was advised that defendant was placed under supervision on a charge of theft, reduced to burglary, and that he had also served three months in the House of Correction on a conviction of grand theft, reduced to criminal trespass to a vehicle. While evidence of the arrest without a conviction on the burglary charge was presented to the court, there is no showing that the court relied upon such evidence in arriving at the sentence imposed; it must be presumed that the court recognized the incompetent nature of the evidence and disregarded it. People v. Fuca (Thomas), 43 Ill.2d 182, 186.

The trial court had before it the trespass to a vehicle, as well as the circumstances surrounding the commission of the instant robbery, and the sentence of from two years to four years is well within the statutory limits set for the crime of robbery. Ill. Rev.Stat. 1969, ch.38,par.18-1; People v. Hampton, 44 Ill.2d 41.

As to the extent of the evidence presented to the court at the hearing in aggravation and mitigation, defense counsel related to the court several matters concerning defendant's personal life, ending his statements with, "That will be about all that I have, your Honor." Defendant was permitted to present evidence in mitigation of the crime as required by the Criminal Code. Ill.Rev.Stat. 1969, ch.38,par.1-7(g).

With regard to the fact that the trial court set the instant sentence to run consecutive to and commence at the expiration of the sentence imposed by Judge Ryan on the March 8, 1969 robbery conviction, Section 1-7 of the Criminal Code provides that where a person is convicted of two or more crimes which did not result from the same conduct, the court in its discretion may order that

the term of imprisonment on any one of the convictions commence to run at the expiration of the term imposed upon the other convictions. Ill.Rev.Stat. 1969, ch.38,par.1-7(m); People v. Ledferd, 94 Ill.App.2d 74; People v. Heirens, 38 Ill.2d 294. Under the circumstances the trial court did not abuse its discretion in ordering that the instant sentence run consecutive to and commence after the expiration of the sentence imposed by Judge Ryan upon the March 8, 1969 robbery conviction.

(It should be noted that, although the initial judgment order of the trial court in the instant cause recited that defendant was placed on probation for a period of three years, the first seven months of which were to be served in the Cook County Jail, it does not appear from the record that defendant in fact served that seven months in the Cook County Jail. The indictment alleged that the instant crimes were committed on December 27, 1968 and the record reveals that defendant entered a guilty plea as to the indictment on March 1, 1969, a little more than two months after the crimes were committed. The record, however, further reveals that defendant was not in the county jail one week after the initial judgment was entered, as ordered in that judgment, inasmuch as he admitted to the robbery March 8, 1969 which occurred on a public street in Chicago and of which he was later convicted and sentenced. The application for revocation of probation filed by the Probation Department reported to the trial court that defendant was ordered by the court upon its finding of guilty on March 1, 1969, to "serve the first 60 days (of his probation) in the county jail, considered served." Further, at the hearing on the rule to show cause, the defendant, and both defendant's counsel and his probation officer represented to the court that a condition of defendant's probation

was that he serve 60 days in the county jail. This discrepancy in "time served" is noted here in light of the fact that defendant, in serving the sentence imposed by the trial court, must be credited with all time already served for the instant crimes. See Ill.Rev.Stat. 1969, ch.38,par.119-3; People ex rel. Herring v. Woods, 37 Ill.2d 435.)

For these reasons the judgment is affirmed.

JUDGMENT AFFIRMED.

LYONS and GOLDBERG, JJ., concur.